Office - Supreme Court, U.S
FILED
APR 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83 - 1779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

—vs.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS L. MORRISSEY,
744 Broad Street
Newark, New Jersey 07102
(201) 622-7711
Counsel for Petitioner
Westinghouse Electric Corporation

Of Counsel:

CARPENTER, BENNETT & MORRISSEY
Attorneys for Petitioner
744 Broad Street
Newark, New Jersey 07102

ROSEMARY A. HALL,
On the Petition.

10 PP

QUESTIONS PRESENTED

1. Whether Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2), which provides that it shall not be a violation of the Act to "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan", is limited to plans in which age is a direct cost factor.

2. Whether this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), mandates the conclusion that the limitations period with respect to an allegedly discriminatory denial of layoff benefits commences when the employee is told the benefits are denied, or when the employee ceases employment and would have received the benefits if eligible therefor, as the Third Circuit held.

PARTIES TO THE PROCEEDING

Petitioner:

Westinghouse Electric Corporation*

Respondent:

Equal Employment Opportunity Commission

---

* Pursuant to Rule 28.1 of the Rules of Court, the following is a list naming all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of petitioner Westinghouse Electric Corporation:

Ateliers de Constructions Electriques de Charleroi, S.A.;
Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSQ);
Electrocontroles Villares, Ltda.;
Electromar Industria Electrica Brasileira, S.A.;
Electromar Nordeste, S.A.;
Ercole Marelli & Company, S.p.A.;
Galileo Argentina C.I.S.A.;
Galileo Uruguaya, S.A.;
Living & Learning (Cambridge), Ltd.;
Mecanica Pesada, S.A.;
Mitsubishi Nuclear Fuel Co., Ltd.;
Motores Electricos de Juarez S.A. de C.V.;
Westinghouse Electric—MK Limited;
Ottermill Products Limited;
Schneider S.A.;
Tyree Industries Limited;
Tyree-Power Construction Limited;
Vektron, S.A.;
Cable TV General, Inc.;
El Paso Cablevision, Inc.;
Filmation Associates;
Focus Cable of Oakland, Inc.;
Gross Point Cable, Inc.;
Group W Cable of Lorain County, Inc.;
Group W Cable of North Central Chicago, Inc.;
Group W Cable of North West Chicago, Inc.;
Group W Cable of St. Paul, Inc.;
Kaiser Teleprompter of Hawaii, Inc.;
Piedmont Cablevision, Inc.;
Southwest Video Corp. (d/b/a Group W Cable);
Telcom Cablevision, Inc.;

Teleprompter of Columbia Heights/Hilltop, Inc.;
Teleprompter of St. Bernard, Inc. (d/b/a Group W Cable);
Teleprompter of Worcester, Inc.;
Bayou Cablevision Company;
Bridgeport Community Antenna TV Co.;
Saw Mill River Cablevision, Inc.;
Teleprompter of Avon Lake, Inc.;
Teleprompter of Denver, Inc.;
Teleprompter of Kentucky, Inc.;
Teleprompter of Milwaukee, Inc.;
Teleprompter of Sacramento, Inc.;
Teleprompter of St. Paul, Inc.;
Teleprompter of Sheffield Lake;
Westinghouse Canada, Inc.;
Transformadores de Distribucion Trade, S.A.;
Westinghouse Electro Metalurgicas C.A.;
Industrias Electronicas, S.A.;
CMW Sistemas, Ltda. (CMWS);
CMW Equipamentos, Ltda.;
Industry Services Company of Saudi Arabia, Ltd. (ISOCOSA);
Westinghouse, S.A. (WESA);
Westinghouse Proyectos Electricos, S.A. (WEPESA);
Westinghouse Asia Controls Corp.;
CD SW Ireland Limited;
Westinghouse Electric Supply Company of Saudi Arabia (WESCOCA);
IEM S.A.;
Wexico Systems and Services, Ltd.;
China Industry Services Co., Ltd.;
Transformadores TPL S.A.;
Metzenauer & Jung Gmbh;
Electro-Fanal S.A.;
Cemac Westinghouse Pty. Ltd.;
Westinghouse (Jamaica) Ltd..

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE

A. Facts 3

B. Proceedings Below 5

REASONS FOR GRANTING THE WRIT

I. The definition of "employee benefit plan" as utilized in Section 4(f)(2) of the Age Discrimination in Employment Act presents an important question of broad application warranting review by this Court; the restrictive definition adopted by the Third Circuit is contrary to the statute's plain language, the legislative intent, and prior administrative interpretations; it will cause widespread disruption of established employee benefit plans and will impose large and unintended retroactive liability upon numerous employers 7

II. The Third Circuit's opinion that the limitations period with regard to an allegedly discriminatory denial of layoff benefits does not commence when the employee is told the benefit is denied, but

PAGE

rather, when the employee ceases employment, is in conflict with this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980)..... 12

CONCLUSION..... 17

APPENDIX:

A. Opinion of the United States Court of Appeals for the Third Circuit 1a

B. Memorandum of the United States District Court for the District of New Jersey, dated March 17, 1982 ..... 26a

C. Opinion of the United States District Court for the District of New Jersey, dated July 29, 1982 .. 28a

D. Memorandum of the United States District Court for the District of New Jersey, dated November 1, 1982 ..... 62a

E. Order of the United States District Court for the District of New Jersey, dated August 5, 1982 .... 68a

F. Order of the United States District Court for the District of New Jersey, dated November 1, 1982 70a

G. Judgment of the United States Court of Appeals for the Third Circuit, dated December 29, 1983.. 71a

H. Order of the United States Court of Appeals for the Third Circuit denying petition for rehearing, dated January 31, 1984..... 73a

TABLE OF AUTHORITIES

Cases Cited PAGE

Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) 13, 14

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 12

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 7, 9

Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974) 9, 11

Bronze Shields, Inc. v. New Jersey Department of Civil Service, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) 15, 16

Chardon v. Fernandez, 454 U.S. 6 (1981) 15

Delaware State College v. Ricks, 449 U.S. 250 (1980) ....i, v, 6, 12, 13

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 7

EEOC v. Westinghouse Electric Corporation, 725 F.2d 211 (3d Cir. 1983) 1

Paris v. Profit Sharing Plan, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981) 14

Price v. Litton Business Systems, Inc., 694 F.2d 963 (4th Cir. 1982) 15

Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978) ... 14

United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) 15, 16

PAGE

Statutes Cited

Age Discrimination in Employment Act Amendments of 1978, Pub.L. 95-256, § 2(a), 92 Stat. 189 2

Age Discrimination in Employment Act of 1967, as amended:

Sections 2 to 17, 29 U.S.C. §§ 621 to 634 2

Section 4(a), 29 U.S.C. § 623(a) 5

Section 4(f)(2), 29 U.S.C. § 623(f)(2) ..... *passim*

Civil Rights Act of 1870, 42 U.S.C. § 1981 13

Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §§ 2100e, *et seq.* 13

Employee Retirement Income Security Act of 1974, as amended,

29 U.S.C. §§ 1001 to 1081 8

29 U.S.C. § 1003(1) 8

29 U.S.C. § 1003(3) 8

Fair Labor Standards Act of 1938, as amended:

Section 16(c), 29 U.S.C. § 216(c) 6

Section 17, 29 U.S.C. § 217 6

Labor Management Relations Act, 1947, as amended:

29 U.S.C. §§ 141 to 187 8

29 U.S.C. § 186(c)(5) 8

28 U.S.C. § 1254(1) 2

Welfare and Pension Plan Disclosure Act, 1958, as amended (repealed 1974):

29 U.S.C. §§ 301 to 309 8

29 U.S.C. § 302(a)(1) 8

PAGE

Other Authorities

113 Cong. Rec. 34,740 (Dec. 4, 1967) 10, 12

113 Cong. Rec. 34,746 (Dec. 4, 1967) 10

House Report No. 805, 90th Cong. 1st Sess., *reprinted in* 1967 *U.S. Code Cong. & Admin. News* 2213 9

Senate Report No. 95-493, 95th Cong., 2d Sess., *reprinted in* 1978 *U.S. Code Cong. & Admin. News* 504 11

United States Department of Labor Interpretative Bulletin (1983):

29 C.F.R. § 860.120 10

29 C.F.R. § 860.120(a)(1) 10

United States Department of Labor Wage Hour Opinion Letter 451 (1978) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

—VS.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Westinghouse Electric Corporation [hereinafter referred to as "Westinghouse"], prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this proceeding.

Opinions Below

The opinion of the court of appeals reversing the Order of the district court is reported at 725 F.2d 211 (3d Cir. 1983). It appears in Appendix A to this Petition.

The memorandum, opinion and supplemental memorandum of the United States District Court for the District of New Jersey are not reported. They appear in Appendices B, C, and D to this Petition.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 29, 1983 (Appendix G). A timely petition for rehearing and rehearing *en banc* was filed; it was denied on January 31, 1984 (Appendix H). This petition is filed within 90 days thereof.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The following section of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 to 634 [hereinafter referred to as the "ADEA"], is involved in this case:

Section 4(f)(2), 29 U.S.C. § 623(f)(2):

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority sytem or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.[1]

---

1 At the time relevant to the instant action, the final clause of Section 4(f)(2), prohibiting involuntary retirement, was not in effect. That restriction was added by Pub.L. 95-256, § 2(a), April 6, 1978, 92 Stat. 189.

STATEMENT OF THE CASE

A. Facts.

In early 1977, Westinghouse closed its plant in Belleville, New Jersey, and laid off all of its employees there. Employees were provided benefits in accordance with the terms of the Westinghouse Electric Corporation Pension Plan [hereinafter referred to as the "Pension Plan"] and the Pension and Insurance Agreement between Westinghouse and the International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, dated July 12, 1976 [hereinafter referred to as the "Pension and Insurance Agreement"]. Both were the result of collective bargaining.[2]

The portions of the plans here at issue provided, in essence, that employees eligible for early retirement pension benefits under the Pension Plan were not eligible for "Layoff Income and Benefits" [hereinafter sometimes referred to as "LIB"] under the Pension and Insurance Agreement. Article VI, Section 1(a) of the Pension and Insurance Agreement defined an employee eligible for LIB as follows:

> An Eligible Employe, as defined below, will receive Layoff Income and Benefits in accordance with one or more of Options (a), (b), and (c), listed below, from a Total Maximum Sum available to him which is equal to one (1) 'Week's Pay' for each full year of his service with the Company. *An Eligible Employe is an employe with two (2) or more full years of such service who is not entitled to early retirement, as specified in the Westinghouse Pension Plan*, and is not on disability or leave of absence, who is laid off through no fault of his own for

---

2 The Pension and Insurance Agreement was negotiated directly as a part of the parties' collective bargaining agreement, and adoption and maintenance of the Pension Plan was required by the terms of the Pension and Insurance Agreement.

> lack of work occasioned by reasons associated with the business (such as changed customer ability and willingness to buy as reflected in adjusted production requirements, changed manufacturing processes, product discontinuance or plant closing), and who has not been recalled to work [Emphasis added.]

The Pension Plan, in turn, provided for three types of Early Retirement. The first was available to employees age 60 and above, with 10 or more years of credited service. The second was available to employees laid off after reaching age 59 but before reaching age 60, with at least ten, but not more than 30 years of credited service. The third was available to employees laid off as a result of a location closedown after reaching age 55 but before reaching age 60, with ten or more years of credited service.[3]

Through this interaction of the Pension Plan's early retirement provisions and the Pension and Insurance Agreement's LIB provisions, laid off employees with sufficient years of credited service were insured of receiving one form of income continuation—either LIB or pension—but were prohibited from receiving both. Because the early retirement pensions and LIB were designed to serve the same purpose of income continuation and insurance against lay-off, receipt of both was considered "double dipping."

The LIB benefit provided by the Pension and Insurance Agreement is not a simple severance pay benefit. It is available

---

3 Both the LIB and Pension Plans were in effect prior to enactment of the ADEA. The policy of denying LIB to employees eligible for early retirement was instituted in 1960 and was continued in the 1966 Pension and Insurance Agreement. The applicable provisions of that agreement were continued in the 1976 Pension and Insurance Agreement, in effect at the times relevant herein. The early retirement provision of the 1966 and 1976 Pension Plans also remained essentially the same. The sole amendment was the lowering of the permissive early retirement age for employees laid off a result of a location closedown, from 60 to 55 years of age.

to employees on lay-off in a variety of circumstances and forms, including a lump sum upon a layoff expected to last more than six months, and income extension payments which are integrated with government unemployment insurance, contractual sickness and disability benefits, workers' compensation, retraining allowances, and temporary disability laws.[4]

B. The Proceedings Below.

On April 14, 1977, a Westinghouse employee laid off as a result of the Belleville plant closing filed an administrative complaint of age discrimination with the United States Department of Labor. He alleged that he had been improperly denied Layoff Income and Benefits because of his eligibility for Special Early Retirement Upon a Location Closedown, and that he was legally entitled to both.

On March 28, 1980, the Equal Employment Opportunity Commission [hereinafter referred to as the "EEOC"] filed a complaint in the United States District Court for the District of New Jersey. It alleged that Westinghouse had violated Section 4(a) of the ADEA, 29 U.S.C. § 623(a), "by its failure to provide severance pay to terminated employees aged 55 and older who have ten years of service with the Defendant and who are eligible for retirement benefits." The prayer for relief sought a permanent injunction and the payment of "severance pay" and liquidated damages to the employee who had filed the administrative charge, as well as to all other similarly situated employees. An amended complaint, filed nearly a year later on February 28, 1981, was identical but for the addition of the names of 64 other employees alleged to have been similarly affected.

On cross-motions for summary judgment, the district court granted summary judgment in favor of Westinghouse. The court held (1) that the Westinghouse Pension Plan and the

---

4 An extensive and detailed description of the LIB benefit is included in the district court opinion, Appendix C at 43-51.

Pension and Insurance Agreement are *bona fide* employee benefit plans within the meaning of Section 4(f)(2), and that Westinghouse's observance of their terms was, therefore, not a violation of the ADEA; (2) that, in any event, the denial of LIB to employees eligible for early retirement did not constitute intentional age discrimination; and (3) that the EEOC's claims under 29 U.S.C. § 216(c) and § 217 were barred by the statute of limitations.

The Third Circuit reversed and remanded. It held that the Section 4(f)(2) *bona fide* employee benefit plan exception was inapplicable because the Pension Plan and Pension and Insurance Agreement were severable, and the portion of the Pension and Insurance Agreement which provided for LIB was not an "employee benefit plan" within the meaning of that Section. A plan providing employee benefits is not an "employee benefit plan" within the intendment of Section 4(f)(2), the Third Circuit ruled, unless age is a direct cost factor in the calculation of benefits thereunder.

The Third Circuit also reversed the district court's holding that, under *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the limitations period on each employee's claim commenced when he was told, in anticipation of layoff, that he would not receive LIB. The court found *Ricks* distinguishable on the stated grounds that (1) the denial of LIB to various employees constituted a "continuing violation"; and (2) that because the employees' right to receive LIB payments would not have accrued until after their layoffs, their causes of action for alleged discriminatory denial of same did not accrue until that time.

REASONS FOR GRANTING THE WRIT

POINT I.

THE DEFINITION OF "EMPLOYEE BENEFIT PLAN" AS UTILIZED IN SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT PRESENTS AN IMPORTANT QUESTION OF BROAD APPLICATION WARRANTING REVIEW BY THIS COURT; THE RESTRICTIVE DEFINITION ADOPTED BY THE THIRD CIRCUIT IS CONTRARY TO THE STATUTE'S PLAIN LANGUAGE, THE LEGISLATIVE INTENT, AND PRIOR ADMINISTRATIVE INTERPRETATIONS; IT WILL CAUSE WIDESPREAD DISRUPTION OF ESTABLISHED EMPLOYEE BENEFIT PLANS AND WILL IMPOSE LARGE AND UNINTENDED RETROACTIVE LIABILITY UPON NUMEROUS EMPLOYERS.

Section 4(f)(2) of the ADEA provides that it shall not be a violation of that Act to observe the terms of a "bona fide employee benefit plan, such as a pension, insurance, or retirement plan, which is not a subterfuge to evade the purposes of the Act." The Third Circuit decision herein holds, with virtually no analysis or explanation, that as used in § 4(f)(2), "employee benefit plan" is limited to plans in which age is a direct cost factor. Petitioner respectfully submits that this holding, adopted by the Ninth Circuit in *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), is contrary to the statute's plain language, the legislative history, and even prior administrative interpretations. It is judicial ratification of unauthorized administrative legislation, which will cause widespread disruption of established employee benefit plans and which will impose significant and unintended retroactive liability.

As this Court stated in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), "in all cases involving statutory construction, 'our starting point must be the language employed by Congress', and we must assume 'that the legislative

purpose is expressed by the ordinary meaning of the words used'. (citations omitted). The statutory language here at issue is clear and thus falls within this rule, but it was not applied as written. Section 4(f)(2) exempts "an employee benefit plan, such as a retirement, pension or insurance plan." It does not state that it applies only to employee benefit plans in which age is a direct cost factor, as the court of appeals held.

Nor does the common meaning of "employee benefit plan" suggest the age/cost limitation imposed by the court of appeals. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 to 1081, defines an employee benefit plan as "any plan, fund, or program . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits . . . ." 29 U.S.C. § 1003(1); *see* 29 U.S.C. § 1003(3).[5] The Labor Management Relations Act, 1947, 29 U.S.C. §§ 141 to 187, similarly defines an employee benefit plan as a program for "medical or hospital care, pensions for retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. § 186(c)(5).

In short, the common meaning of the language utilized by Congress neither supports nor suggests the Third Circuit's conclusion that a plan providing welfare or pension benefits to employees is not an "employee benefit plan" unless age is a direct cost factor in the calculation of benefits thereunder.

---

5 The predecessor Welfare and Pension Plans Disclosure Act, 1958, 29 U.S.C. §§ 301 to 309, defined an "employee welfare benefit plan" as "any plan, fund, or program . . . for the purpose of providing for its participants or their beneficiaries, through the purpose of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment." 29 U.S.C. § 302(a)(1).

Nor does the descriptive phrase utilized by Congress, "such as a retirement, pension, or insurance plan," support the Third Circuit's age/cost restriction. Although age is actuarially significant in many pension plans and some insurance plans, it is not significant in all such plans. It was irrelevant in the profit sharing plan in *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), and is irrelevant in all individual account and defined contribution pension plans. For this reason, the descriptive phrase "such as a retirement, pension or insurance plan" cannot properly be read as though it were a proviso, "provided that age is a direct cost factor." Had Congress intended such a limitation—which is not reasonably inferable from the common meaning of "employee benefit plan," "retirement plan," "insurance plan," or "pension plan"—it would have included it. It is not for the Third Circuit or the EEOC to create such a limitation for Congress.

Because the language of the statute is clear, it should be conclusive under the rule of *American Tobacco Co. v. Patterson*, *supra*, making examination of the legislative history and policy considerations unnecessary. However, if these additional factors are considered, they serve only to reinforce the conclusion that Congress intended precisely what it said in Section 4(f)(2): to exempt *all* employee benefit plans from scrutiny under the ADEA. The House Report on the bill as enacted described the exception as follows:

> It is important to note that [Section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exemption was an amendment to the original bill, is considered vita [*sic*] to the legislation, and was favorably received by the witnesses at the hearings.

House Report No. 805, 90th Cong., 1st Sess., *reprinted in* 1967 *U.S. Code Cong. & Admin. News* 2213, 2217. This expansive

view of the exemption is reiterated throughout the legislative history. Congressman Reid of New York emphasized that "the bill takes into consideration the problems and interests of employers . . . It also takes account of the problems of employers in the field of pension *and other benefit plans*. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans." 113 Cong. Record 34,746 (Dec. 4, 1967) (emphasis added). Congressman Perkins stated it succinctly: "Exceptions are provided in order not to disrupt employee benefit programs, seniority systems and the like." 113 Cong. Rec. 34,740 (Dec. 4, 1967). Nowhere in the debates or in the reports accompanying enactment of the ADEA is there even the slightest suggestion that an employee benefit plan is not an "employee benefit plan" under Section 4(f)(2) unless age is a direct cost factor in the calculation of benefits thereunder.

Not even administrative interpretations provide uniform support for the EEOC's and the Third Circuit's age/cost restriction. A United States Department of Labor Interpretive Bulletin, 29 C.F.R. § 860.120, sets forth detailed restrictions on the definition of an employee benefit plan which require, among other things, that the cost of benefits for all employees be equal, regardless of age. The preface to the Bulletin justifies this interpretation as follows: "The legislative history of [Section 4(f)(2)] indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." 29 C.F.R. § 860.120(a)(1). It is submitted that this statement is inaccurate and that the administrative interpretation is, therefore, invalid.

Throughout the course of this litigation, the EEOC has been unable to identify even a single statement in the legislative history of the ADEA which suggests that Congress intended exemption under Section 4(f)(2) to be limited to plans which complied with a detailed cost equality formula such as that set forth in the Interpretive Bulletin. Such a scheme, in fact, is directly contrary to Congress' statement that the purpose of

the exemption was to encourage the hiring of older workers without necessarily including them in employee benefit plans. Obviously, there can be no cost equality in that situation, inasmuch as the cost of no benefits will never equal the cost of any benefit.

Moreover, this outright exclusion of older workers from benefit plans was specifically endorsed by the Department of Labor, even while its cost-equality interpretation was in effect. In 1978, then-Assistant Secretary of Labor for Employment Standards Donald Ellisburg responding to questions by Senators Javits and Williams, stated that increasing the protected age group to 70 would require an employer neither to credit years of service beyond the plan's normal retirement age nor to pay the actuarial equivalent of normal retirement benefits to employees who chose to work beyond their plan's normal retirement age. Senate Report No. 95-493, 95th Cong., 2d Sess., *reprinted in* 1978 *U.S. Code Cong. & Admin. News*, 516, 518-19. In the same year, Wage-Hour Opinion Letter 451 was issued, holding a practice virtually identical to that involved herein to be valid.

For these reasons, the Fifth Circuit correctly held in *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (5th Cir. 1974), that "[t]he primary difficulty with [the cost equality standard] is that it attempts to use legislative history to *override* the unambiguous language of the statute" (emphasis in original).[6]

In sum, Westinghouse respectfully submits that the Third Circuit's holding that "employee benefit plan", as used in Section 4(f)(2), is limited to plans in which age is a direct cost factor is in error because it is in conflict with the unambiguous language of the statute and clear legislative intent. Westinghouse further submits that this decision is as important as its impact is broad. Although the question of what constitutes

---

6 As discussed above, Westinghouse submits that the legislative history does not support the EEOC's interpretation.

an employee benefit plan arose in connection with an integrated unemployment/retirement program in the case at bar,[7] the Third Circuit's opinion is not so limited. It excludes from Section 4(f)(2) not just unemployment programs, but also all health insurance in which costs are not age-based, all profit-sharing retirement programs, and all defined contribution retirement programs of any other nature. This new restriction, not apparent on the face of the statute, will disrupt and require the revamping of benefit plans covering hundreds of thousands of employees. Even more important, because the restriction has been imposed judicially, as an interpretation of an existing statute, the required revisions carry with them the potential of three years' retroactive liability. Surely, this was not what Congress had in mind when it promised that Section 4(f)(2) would assure employers that the ADEA would "not disrupt employee benefit programs, seniority systems and the like." 113 Cong. Rec. 34,740 (Dec. 4, 1967).

POINT II.

THE THIRD CIRCUIT'S OPINION THAT THE LIMITATIONS PERIOD WITH REGARD TO AN ALLEGEDLY DISCRIMINATORY DENIAL OF LAYOFF BENEFITS DOES NOT COMMENCE WHEN THE EMPLOYEE IS TOLD THE BENEFIT IS DENIED, BUT RATHER, WHEN THE EMPLOYEE CEASES EMPLOYMENT, IS IN CONFLICT WITH THIS COURT'S DECISION IN *DELAWARE STATE COLLEGE v. RICKS*, 449 U.S. 250 (1980).

The Third Circuit reversed the district court's ruling that this action is barred by the statute of limitations, holding that the lower court erroneously interpreted and applied this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). It is respectfully submitted that the grounds relied upon

---

7 Integrated benefit packages like that involved in the instant action are not uncommon. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), for example, this Court considered two corporate benefit plans which integrated, *inter alia*, workers' compensation benefits and pensions, and held that this integration did not violate ERISA.

by the Third Circuit to distinguish and limit *Ricks* are not valid, and that the effect of its opinion is to reinstate the rule of *its* decision in *Ricks*, which decision was previously reversed by this Court.

The plaintiff in *Ricks* alleged that he had been unlawfully denied tenure in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. He was advised that he had been formally denied tenure in March 1984. In June 1974, he was offered a "terminal" one-year contract to expire in June 1975, and in April 1975, he filed an administrative complaint with the EEOC.

The district court dismissed the action as untimely. Noting that the only discrimination alleged was the denial of tenure, it held that the limitations period began to run by June 26, 1974, when plaintiff was advised that he would be offered a one-year terminal contract.

The Third Circuit reversed the district court, in an opinion by Judge Higginbotham. Although recognizing that the discrimination alleged was the denial of tenure, the court nonetheless held that the limitations period did not begin to run until the terminal contract expired and the plaintiff stopped working. Three reasons for this ruling were articulated: (1) The college could have changed its decision denying tenure, *id*. at 712; (2) employees should not be required to institute litigation while still working, because the litigation process will divert attention from fulfillment of job duties, *id*. at 712; and (3) there was a continuing discriminatory process from advice of denial of tenure to actual termination of employment. *Id*. at 713.

This Court reversed. Because the alleged discriminatory act was the denial of tenure, it reasoned, the limitations period commenced when the tenure decision was made and communicated to Ricks. 449 U.S. at 258. The Court rejected plaintiff's contention that the limitations period did not commence until he felt the effects of the alleged discrimination (*i.e.*, when his employment terminated), quoting *Abramson v. University of*

Hawaii, 594 F.2d 202, 209 (9th Cir. 1979): "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." 449 U.S. at 258.

It is respectfully submitted that this decision compels the conclusion that the limitation period in the case at bar commenced as to each individual employee on the date he was told that he would not receive LIB. Because it was the denial of LIB which was complained of—not the termination of employment—the statute of limitations began to run with respect to each employee on the date he was counselled by Westinghouse and told that he would receive pension benefits but not LIB. The analysis utilized by the Third Circuit to support its contrary conclusion is in error.

The Third Circuit concluded that the "denial" of LIB occured on the date the plant closed, because the employees did not have enforceable claims for such until that time (Appendix A at 14). However, the two pension cases cited in its opinion do not support that conclusion. In *Paris v. Profit Sharing Plan*, 637 F.2d 357, 360-61 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), the Fifth Circuit held that the plaintiffs' ERISA action accrued not when the subject plan was adopted, but when the plaintiffs' applications for benefits were denied. "A cause of action accrues," the court held, "when the events upon which it is based occurred." 637 F.2d at 361. In *Reiherzer v. Shannon*, 581 F.2d 1266, 1271 (7th Cir. 1978), the Seventh Circuit held that an action for benefits under ERISA accrued "at the time the trustees of the pension plan deny an application for benefits." Neither decision holds, as the Third Circuit did in the case at bar, that an employee who has been told he has been denied the right to receive pension or other benefits payable upon the termination of employment has no cause of action therefor until the actual termination of employment.

Nor has any other post-*Ricks* appellate decision held, as the court below did, that a claim for denial of an employment benefit does not accrue until the time the employee would have

received the benefit but for the unlawful denial. That is precisely the rule rejected by this Court in *Ricks*. In *Ricks*, the plaintiff's claim for denial of tenure accrued on the date he was advised thereof, not on the date a grant of tenure would have become effective.[8] In *Chardon v. Fernandez*, 454 U.S. 6 (1981), the plaintiffs' claims for termination of employment accrued on the dates they were advised that their employment would be terminated, not on the later dates their employment actually ended. In *Price v. Litton Business Systems, Inc.*, 694 F.2d 963 (4th Cir. 1982), the plaintiff's claim for termination accrued on the date he was told he would be terminated, not on the later date he stopped working or the even later date his technical status as an employee terminated. "The filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, regardless of when the effects of that decision come to fruition." 694 F.2d at 965.

In sum, the date of the plant closing herein was irrelevant to the limitations question, because no discrimination was alleged to have occurred at that time. Westinghouse presented an uncontroverted affidavit in the district court setting forth the dates on which the employees were told they would receive pensions but not LIB. Under all of the above-cited cases, those are the dates on which the limitations period as to each employee's claim began to run.

The Third Circuit's conclusion that there was a "continuing" violation is similarly in error, and in conflict with its own decision in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982), as well as this Court's decision in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977).

---

8 Although the Third Circuit stated that "In *Ricks*, the professor was eligible for tenure at the time he received notice of its denial," Appendix A at 14, there is nothing in any of the *Ricks* decisions to suggest that had Ricks been granted tenure, it would have been effective immediately instead of at the start of the next academic term.

In *Bronze Shields*, the Third Circuit held that the continued use of discriminatory eligibility lists in hiring and promotion did not in itself constitute a continuing violation. It distinguished that case in this action, however, stating that here, unlike there, there were specific instances of discriminatory conduct, *i.e.*, the denial of LIB to each of the 65 employees named in the Amended Complaint. Yet, the panel failed to explain why the limitations period for each of those denials did not run from the date the denial was made. Each denial of LIB was a discrete act; the mere fact that 65 discrete acts occurred does not make any one of them a continuing violation. The maternity-leave and seniority policies at issue in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), were broadly applicable to all female employees, yet this Court did not hold that the existence of other discriminatory applications of that policy transformed Ms. Evans' claim into a continuing violation.

In sum, Westinghouse submits that the Third Circuit has violated, not interpreted, the rule established by this Court in *Ricks*. In so holding, it has not only confused the important questions of limitations, but also has erroneously expanded the definition of a continuing violation. It is, therefore, respectfully requested that this Court grant this petition and reverse the judgment of the Third Circuit.

CONCLUSION

For the foregoing reasons, this petition a for writ of *certiorari* should be granted.

Respectfully submitted,

THOMAS L. MORRISSEY
744 Broad Street
Newark, New Jersey 07102
(201) 622-7711

Counsel for Petitioner

CARPENTER, BENNETT & MORRISSEY
Attorneys for Petitioner.

ROSEMARY A. HALL,
On the Petition.

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals, dated December 29, 1983

(As Amended for Clerical Corrections by Order entered January 20, 1984)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5008

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 80-00853)

Argued September 13, 1983

B e f o r e:
WEIS, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

(Opinion Filed: December 29, 1983)

DAVID L. SLATE
General Counsel
PHILIP B. SKLOVER
Associate General Counsel
VELLA M. FINK
Assistant General Counsel
COLLEEN M. O'CONNOR
SUSAN ELIZABETH REES (Argued)
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, DC 20506
Attorneys for Appellant

THOMAS L. MORRISSEY
ROSEMARY A. HALL (Argued)
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, NJ 07102
Attorneys for Appellee

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

Plaintiff-appellant, Equal Employment Opportunity Commission ("EEOC" or "the Commission"), appeals an order of the United States District Court for the District of New Jersey granting summary judgment to defendant-appellee, Westinghouse Electric Corporation ("Westinghouse"). Appellant brings this action on behalf of 65 employees and contends that Westinghouse violated the Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634 (1976), by denying Layoff Income and Benefits to its employees aged 55 and older whose jobs were terminated by a plant closing. Appellant argues that such denial was improperly based on the employees' entitlement to early retirement benefits.

Viewing the record in the light most favorable to the appellant, we are asked to decide three issues: First, whether this action is time-barred under ADEA; second, assuming it is timely, whether the district court held correctly that reasonable factors other than age supported the denial of Layoff Income and Benefits to employees entitled to early retirement pension benefits; and third, whether Westinghouse's actions were in observance of the terms of a bona fide employee benefit plan and therefore excluded from ADEA coverage.

We find that the district court erred in disposing of this case by granting summary judgment. Therefore, we will reverse the order granting summary judgment and we will remand this case to the district court for trial.

I.

On April 14, 1977, Paul Meola, a Westinghouse employee, filed an administrative complaint with the United States Department of Labor challenging Westinghouse's denial of Layoff Income and Benefits ("LIB") under the Pension and Insurance Agreement ("Pension and Insurance Agreement"). Meola argued that his eligibility for "Special Early Retirement" under the Westinghouse Electric Corporation Pension Plan ("Pension Plan") was an improper reason for denying him LIB benefits. Before the dispute could be resolved by the Department of Labor, however, Congress transferred enforcement authority to the EEOC,[1] which initated this action below on behalf of Paul Meola and other "similarly situated" employees on March 28, 1980. The EEOC later amended its complaint on February 28, 1981 to add the names of 64 additional employees as injured parties in this suit.

All of these employees worked at the Westinghouse plant in Belleville, New Jersey when it closed on April 1, 1977. Westinghouse provided monetary benefits under the LIB Plan to "eligible" employees who were "laid off through no fault of

---

1 Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C.A. app. at 150 (West Supp. 1979), *and in* 92 Stat. 3781 (1978).

[their] own for lack of work occasioned by reasons associated with the business," such as a plant closing. Appendix ("App.") at 23. The LIB Plan defines an "eligible" employee as follows:

> An Eligible Employe is an employe with two (2) or more full years of such service who is not entitled to early retirement, as specified in the Westinghouse Pension Plan, and is not on disability or leave of absence, who is laid off through no fault of his own for lack of work occasioned by reasons associated with the business (such as . . . [a] plant closing), and who has not been recalled to work.

(App. at 251).

The LIB Plan permits eligible employees to choose between two forms of payment—lump-sum or weekly payments. Specifically, the Plan's lump-sum option provides:

> (a) Lump Sum Payment up to Sixty (60) Days
>
> Within sixty (60) days after a layoff which in Management's opinion will exceed six (6) months in duration, an Eligible Employe *may permanently sever his relationship with the Company and may relinquish recall rights and service credits for any purpose* (except such rights as may exist under the Pension Plan) *and may thereupon receive the Total Maximum Sum available to him,* together with vacation pay and any other sums due him, in a Lump Sum Payment. If such employe has vested rights under the Westinghouse Pension Plan, he may elect not to withdraw his pension contributions, if any.

(App. at 252) (emphasis added). By electing weekly payments, on the other hand, an employee neither severs his relationship with Westinghouse nor risks his recall rights. (App. at 254). Westinghouse operated this LIB Plan under the Pension and Insurance Agreement which is part of the collective bargaining agreement. (App. at 251-254).

Under this same collective bargaining agreement, Westinghouse must also maintain a pension plan. The pension plan in effect at the time of the Belleville Plant closing was a recently amended version of the 1966 Pension Plan which delineated

four categories of retirement—"normal retirement," "early retirement," "deferred retirement" and "selected retirement." (App. at 175-176). For the purposes of this appeal, we will focus on the "early retirement" and "selected retirement" provisions.

Two "early retirement" options were available. An employee with 10 or more years of service could retire on the first day of the month following his 60th birthday. An employee with 10 or more years of service who was *laid off* after reaching his 59th birthday, but before reaching his 60th birthday, who had not returned to work, could retire on the first day of the month following his 60th birthday, provided that he had not elected to receive a lump-sum payment related to the layoff. Finally, under "selected retirement," an employee with 30 or more years of service could retire on the first day of any month after his 62nd birthday and prior to his normal retirement date. (App. at 175-78).

The early retirement and selected retirement provisions of this Pension Plan were amended on August 1, 1976 to provide that an employee with either more than 10 years of service, or more than 30 years of service who is *laid off as a result of plant closing, after reaching his 55th birthday and before attaining his 60th birthday,* could retire so long as he had not received a lump-sum payment occasioned by the lay off and had not returned to work. (App. at 260, 276-277).

Under Westinghouse's interpretation of the LIB Plan and the Pension Plan, to be "eligible" for LIB, an employee must not be "entitled" to early retirement as defined in the Pension Plan. Thus, between January 12, 1977 and March 17, 1977, Westinghouse "counseled" 65 employees who were 55 years or older that they were ineligible for LIB because they were "entitled" to early retirement. (App. at 51-53). Accordingly, when the Belleville, New Jersey Plant closed on April 1, 1977 Westinghouse summarily placed these employees on early retirement and denied them LIB benefits.

II.

EEOC maintains that Westinghouse's policy of excluding employees 55 years or older from LIB payments violated Section 4(a) of the ADEA.[2] 29 U.S.C. § 623(a). EEOC charges that Westinghouse "has willfully violated and is now willfully violating" the provisions of the ADEA by continuing its policy of denying LIB to employees on the basis of age. (App. at 5). EEOC seeks recovery of severance pay, liquidated damages and a permanent injunction prohibiting Westinghouse's enforcement of the eligibility provision of the LIB Plan insofar as it results in the denial of LIB to any employee because of his eligibility for retirement benefits under Sections 16(c) and 17 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216(c), 217.

Throughout the employees' journey to have this case decided on the merits of their claim of illegal age discrimination, they have been confronted with numerous barriers to preclude any relief. These barriers include Westinghouse's defense that this action was time-barred under the applicable statutes of limitations in Section 4(e). 29 U.S.C. § 626(e). Westinghouse also asserts that regardless of the applicability of the statute of limitations, its conduct was sanctioned by the ADEA in that it was excused under the specific exceptions in either Section 4(f)(1) or 4(f)(2). 29 U.S.C. §§ 623(f)(1), 623(f)(2).

---

2 Section 4(a) proscribes age discrimination in employment. The pertinent portion of the statute provides:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

Section 4(f)(1) permits an employer to differentiate among employees on the basis of age if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where such differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Section 4(f)(2) allows an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes" of the Act. 29 U.S.C. § 623(f)(2). On the basis of these defenses, Westinghouse moved for summary judgment.

The district court granted Westinghouse's motion for summary judgment on several grounds. The court concluded that this action was time-barred. Alternatively, the court held that, even if timely, Westinghouse's practices regarding the denial of LIB to older workers were excused on the basis that (1) any differences in consequences were based on reasonable factors other than age and (2) that Westinghouse had acted in observance of the terms of a bona fide employee benefit plan which was not a subterfuge to evade the purposes of the Act. (App. at 65-94).

III.

The principles governing review of the grant or denial of a motion for summary judgment are well settled. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate only where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

This court is required to ascertain the existence of any disputed issues of material fact by viewing the record in the light most favorable to the party opposing the motion. All inferences, doubts and issues of credibility are resolved against the party moving for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam); *Ely v. Hall's Motor Trans. Co.*, 590 F.2d 62, 66 (3d Cir. 1978). In this case, the EEOC challenges Westinghouse's summary judgment

victory below; therefore, we must accept as true the EEOC's properly plead factual allegations. *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Mahler v. United States*, 306 F.2d 713, 715 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962). Moreover, we must draw all reasonable inferences against Westinghouse. *EEOC v. Home Insurance Company*, 672 F.2d 252, 257 (2d Cir. 1982).

By reason of the district court's dismissal of the complaint, we must review each of the court's alternative findings and holdings. The district court's decision was no model of clarity. The court wrote three separate memorandum opinions, and in the two subsequent opinions, it repudiated the holdings made in the earliest opinion. While the court's rationale was not always clear, the result was always the same. In each instance the court concluded that these 65 employees had no viable claim. (App. at 63, 65, 96).

We will analyze first, the issues pertaining to timeliness under ADEA statute of limitations; and second, the issues of whether the district court erred in concluding that Westinghouse had valid substantive defenses under either Section 4(f)(1) or 4(f)(2).

IV. TIMELINESS

The district court found this action to be time-barred in several respects. To determine the significance of the district court's ruling on the statute of limitations issues, there are a number of separate, but interrelated components which must be considered.

First, critical to all employees is the issue of whether the district court was correct in finding that, on this record, the ADEA's two-year statute of limitations applied rather than the three-year statute of limitations. As a result of reliance on the two-year statute of limitations, *all* 65 employees were precluded from relief. This issue involves the presence or absence of a "willful" violation.

Second, if the district court erred on its ruling as to the applicability of the two-year statute of limitations and it should have ruled that on this record a three-year statute of

limitations applied, we must, nevertheless, make other subsidiary findings to determine whether these employees have a cause of action even under a three-year statute of limitations. The district court reasoned that even if the three-year statute of limitations applied, the cause of action started to accrue as to each employee on the date when he was "counseled" as to eligibility for LIB, and that the statute of limitations continued to run until such time as the employee was specifically named in a complaint or amended complaint. By this rationale, 64 of the 65 employees had their claims time-barred. Paul Meola was the only employee who overcame the barrier, and the other 64 employees had their claims dismissed, *inter alia*, on statute of limitations grounds.

In order to decide whether the other 64 employees complied with the three-year statute of limitations, we must ascertain (a) when the statute of limitations started to run—at the time of the counseling between January 12, 1977 and March 16, 1977, or at the time of the plant closing on April 1, 1977, and (b) when the statute of limitations was tolled—as to (i) Paul Meola, the only employee specifically named when the original complaint was filed on March 28, 1980, and as to (ii) the other 64 employees who were not specifically named until the complaint was amended as of February 28, 1981.

We conclude that the district court erred as a matter of law on these statute of limitation issues.

A.

Applicable Statutes of Limitations

The ADEA has two different statutes of limitations by incorporation of the statutes of limitations in the Portal-to-Portal Act. A three-year statute of limitations applies in cases of willful violations and all other violations are subject to a two year statute of limitations. 29 U.S.C. § 616(e) (incorporating 29 U.S.C. §§ 255, 259).

If we decided to view the evidence and the law in the light most favorable to Westinghouse, as did the district court, we would find that this complaint was not filed within two years

of either the counseling dates or the plant closing. Thus, if the two-year statute applies, there is no cause of action. Moreover, the original complaint was filed more than three years after the completion of the last employee's counseling on March 16, 1977 but less than three years after the plant closing on April 1, 1977. The amended complaint, which specifically named 64 additional employees, was filed three years and eleven months after the plant closing. Thus, if the statute of limitations was not tolled as to those 64 employees until the date of the filing of their amended complaint, those employees have no cause of action because more than three years had elapsed.

A court must find the employees' claim viable if it finds the three-year statute of limitations applicable and that that statute of limitations runs from the date of the closing of the plant to the initiation of the original complaint, and that when the initial complaint was filed all persons within the class were protected regardless of whether they were explicitly named as aggrieved employees in the complaint. If the latter rationale is accepted, all of the employees had their claims timely filed.

The district court held that the three-year statute of limitations was not applicable in this case. In its last opinion, the court concluded in the section entitled "The Statute of Limitations Revisited," that there was no willful violation, and "so the applicable statute of limitations is the two-year statute rather than the three-year statute." (App. at 92). The court held that Westinghouse did not violate ADEA because the court interpreted the LIB Plan and the Pension Plan as allowing an employee the *choice* of taking LIB payments in a lump-sum or taking early retirement benefits.[3] Because the employee had a choice, the court concluded that no unlawful employer practice occurred. Alternatively, the district court held that the employer's actions were excused under the Act.

---

3 Westinghouse disagrees with the court's interpretation that these Plans gave the employee the option of selecting either LIB payments or early retirement benefits. In this case, and prior thereto, Westinghouse has always maintained that an employee has no choice and if eligible, must take the early retirement plan.

(App. at 89). Since the three-year statute of limitations was applicable only in cases involving willful violations of ADEA, and since the lower court found no willful violation was presented in this case, the court concluded that the three-year statute did not apply. (App. at 92).

We must first consider whether it was error for the district court to summarily decide the willfulness issue. Wilfullness is a question of fact which necessarily raises questions of the appellees' state of mind, knowledge, intent and belief regarding the propriety of their actions. *Cacchione v. Erie Technological Products, Inc.*, 526 F.Supp. 272, 275 (W.D. Pa. 1981); *Allen v. Colgate-Palmolive Co.*, 539 F.Supp. 57, 66 (S.D.N.Y. 1981). A summary judgment order is not defeated, however, merely because an issue of fact exists; the factual issue in dispute must be material to the resolution of the dispute. *Allen v. Colgate-Palmolive Co.*, 539 F.Supp. at 66.

The materiality or immateriality of Westinghouse's alleged willfulness in this case, is dependent upon our determination of whether Westinghouse has advanced a valid defense to an ADEA violation under either Section 4(f)(1) or 4(f)(2). We must also determine when the cause of action accrued and when it was tolled. If the date on which this cause of action accrued was more than three years from the filing of the complaint, willfullness is not relevant and summary judgment was properly granted. If, however, the complaint was filed between the second and third year that the cause of action accrued, willfulness is relevant and can be assessed in terms of whether Westinghouse has a complete defense to this charge of age discrimination. Our problem *ab initio* is to determine when the action accrued and when it was tolled.

(1) *The Accrual Problem*

The original complaint in this action was filed on March 28, 1980. Westinghouse "counseled" the 65 employees between January 12, 1977 and March 17, 1977 by advising them they were ineligible for LIB. The district court believed that the alleged discriminatory practice was the denial of LIB and

therefore, the limitations period started to run with the "counseling" on ineligibility, and that such "counseling" constituted notice of the alleged violation of the ADEA. Relying on the Supreme Court decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the district court thus held that even assuming *arguendo* a willful violation and the applicability of the three-year statute, this action was nevertheless untimely because the employees[4] aged 55 and older received "counseling" as to ineligibility for LIB payments more than three years before the EEOC filed the original complaint. We must determine whether the statute of limitations began to run when the employees were "counseled" or when they were laid-off because of the plant closing.

We believe that the district court's reliance on *Ricks* is misplaced. *Ricks* stands for the proposition that a plaintiff may not rely on the continuing violation theory to advance claims about *isolated instances* of discrimination concluded in the past, even though the *effects* persist into the present.

The plaintiff in *Ricks* was formally denied tenure on March 13, 1974. Notwithstanding this denial of tenure, Ricks was offered and accepted a *terminal* one-year contract on June 26, 1974. After the expiration of the contract, suit was filed challenging the decision to deny him tenure on the basis of discrimination. Ricks argued that the limitation period commenced with the date of discharge—namely, the expiration of the terminal one-year contract. The district court determined that the 180-day statute of limitations period for filing with the EEOC started to run on June 26, 1974, the date Ricks was offered and accepted the terminal contract because that was the day Ricks was put on notice of the decision to deny him tenure. Our court ruled that the statute of limitations began to run when the contract expired since we were of the opinion that the initial decision to terminate an employee might be reversed prior to the specific termination date. *Ricks v. Delaware State College*, 605 F.2d 710, 713 (3d Cir. 1979).

---

4 There were 3 or 4 employees who may not have been defeated by the court's interpretation of the *Ricks'* rationale, but they were found to be barred from relief on other grounds. (App. at 96-99).

The Supreme Court upheld the district court's decision that Ricks' claim was untimely. According to the Supreme Court, Ricks challenged only the decision to deny him tenure, but by asserting the date of discharge as the point at which the statute of limitations began to run, the Court determined that "[i]n effect, he is claiming a 'continuing violation'." *Delaware State College v. Ricks,* 449 U.S. at 257. The allegations in the complaint, however, spoke only of the tenure decision as the discriminatory event and Ricks did not allege any facts suggesting discrimination in his actual discharge. Indeed, it was simply an inevitable *effect* of the decision to deny him tenure. *See also Chardon v. Fernandez,* 102 S.Ct. 28, 29 (1981)(per curiam); *United Airlines, Inc. v. Evans,* 431 U.S. 553, 558 (1977); *Bronze Shields, Inc. v. New Jersey Department of Civil Service,* 667 F.2d 1074, 1083 (3d Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 3510 (1982).

In the case at bar, EEOC has alleged a *continuing* discriminatory policy and specific acts of discrimination that occurred after the development of this policy. Each denial of LIB to each of the 65 employees constituted a specific act which was part of Westinghouse's alleged continuing policy of discrimination on the basis of age. Thus, this case does not involve a discrete, isolated act such as the denial of tenure to one professor. Moreover, the instant case is distinguishable from *Bronze Shields, supra,* and *Hood v. New Jersey Department of Civil Service,* 680 F.2d 955 (3d Cir. 1982). In these cases, we declined to apply the continuing violation theory to the promulgation of discriminatory eligibility lists used in the hiring and promotion of police officers and fire fighters. We found it insufficient to base a finding of continuing violation merely on an allegation that the lists were in continued *use.* We concluded that plaintiffs must also allege specific instances of discrimination occurring because of the lists' continued use. *Id.*

In the present action, the continuing violation is not premised *only* on the continued use or maintenance of the policy at issue here. After the formal promulgation of this policy, the specific instances of discrimination alleged are the application

of this policy of denying LIB to each of these individual employees at the time of the plant closing. These specific instances occurred when the Belleville plant closed and each of the 65 employees was denied benefits.

A denial of LIB benefits could not occur until an employee was eligible to apply for LIB and until the claim was denied due to eligibility for early retirement. An employee did not have an enforceable demand until the claim was denied. *See Paris v. Profit Sharing Plan,* 637 F.2d 357, 361 (5th Cir. 1981), *cert. denied,* 454 U.S. 836 (1981); *Reiherzer v. Shannon,* 581 F.2d 1266, 1272 (7th Cir. 1978). As stated earlier, to be *eligible* for LIB, an employee had to have been laid off as a result of plant closing. Thus, this case is in a different factual setting than *Ricks.* Although the alleged unlawful practice was the adoption and implementation of the policy, a cause of action could not accrue until the discrimination manifested itself by virtue of the policy actually being applied to individual employees at the time of the plant closing through individual LIB claim rejections. *See Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168 (3d Cir. 1978); *Crosland v. Charlotte Eye, Ear and Throat Hospital,* 686 F.2d 208 (4th Cir. 1982). In this case, the plant closed on April 1, 1977. Thus, at the earliest, the statute begins to run as of that date. An April 1, 1977 starting date makes this action timely if a three-year statute applies.

Ricks is also distinguishable because the professor received unequivocal notice that his tenure was denied. Thus again, we must note the significantly different factual settings of the *Ricks* case and the instant matter. In *Ricks*, the professor was eligible for tenure at the time he received notice of its denial. In this case, Westinghouse argues that the "counseling" on the effects of its eligibility policy constituted notice. This fact is disputed.

In *Ricks,* the plaintiff received a written notice on June 26, 1974 that he would be offered a one-year terminal contract that would expire on June 30, 1975. In the view of the Supreme Court, with such a notice, there was nothing else he had to do to ascertain the college's intentions as to his actual termination date. Thus, in *Ricks*, there was precise specificity as to the date

of termination unlike the instant matter which is intertwined with uncertainty as to whether the employees were even informed as to when the layoff would actually take place. In contrast to *Ricks*, there is no evidence, before this court, indicating that the Westinghouse employees received any notice—oral or written—of the actual date when the Belleville, N.J. plant would be closed. Nor can we expect these employees to have had some mystical powers of omniscience whereby they knew the precise date management was to close the plant. It is conceivable that in February 1977, those employees who were not privy to management's secrets might have been under the impression that the Belleville, N.J. plant would not be closed for months or even years. Furthermore, the mere adoption of this controversial policy in and of itself cannot be considered to constitute notice of the alleged discrimination because there is an issue as to whether Westinghouse's policy as applied actually coincided with the terms of the LIB and Pension Plans in effect at that time.[5]

Finally, even assuming an employee did receive notice that even were he otherwise eligible for LIB, his eligibility for early retirement made him ineligible for such benefits, an employee would still not have standing to bring an action until he at least was eligible to apply for LIB at the time of the plant closing. The record does not reveal any mechanism for the employees here to have filed for LIB benefits prior to actual plant closing. Thus, unlike *Ricks*, where the plaintiff could have maintained an action as of the date he was notified of the denial of tenure, in this case, the employees could not have maintained an action until denied LIB.

---

5 The policy was orally communicated and in that regard, vague in its particulars. Moreover, it was contingent upon certain events, such as the closing of a plant. The record before this court consists only of a list naming the employees "counseled." (App. at 51). At oral argument, Westinghouse conceded that there is no information as to what these individuals were told concerning the plant closing, whether they were told that they had a choice with regard to LIB and early retirement or whether they were informed that early retirement was mandatory. Therefore, even if the continuing violation theory were not applied, there is a genuine issue of material fact as to whether the 65 employees in fact received adequate and unequivocal notice.

(2) *Tolling of the Statute*

The district court held that even assuming the application of the three-year statute, the only claim tolled in this action was that of Paul Meola because at the time the original complaint was filed, Paul Meola was the only employee specifically named as required under Section 16(c) of the FLSA. 29 U.S.C. § 216(c). The names of the employees were not listed in the caption of the original complaint; the only named plaintiff in the caption was EEOC. In the pleadings, the EEOC listed only one employee by name specifically—Paul Meola—but in the EEOC's effort to protect the class, they alleged that the suit was filed on behalf of

> Paul Meola, *Jane Doe, Richard Roe, and other similarly situated employees* who were eligible for retirement, [who] were unlawfully denied severance pay when terminated due to the closing of defendants Belleville, New Jersey facilities on or about April 1, 1977.

(App. at 5) (emphasis added).

In the view of the district court, the EEOC's references to "Jane Doe, Richard Roe and other similarly situated employees" were insufficient to toll application of the statute of limitations as to those unnamed employees who constituted the class of "similaly situated employees."

Despite the fact that paragraph eight of the original complaint had been amended on February 28, 1981 to note with specificity the names of these other similarly situated employees,[6] the district court held that the statute of limitations was

---

6 The docket entries note that the amended complaint was filed on March 3, 1981. (App. at 2). The district court in its memorandum opinion states that the amended complaint was filed on February 28, 1981 (App. at 98). Paragraph eight of the original complaint was amended to allege as follows:

> 8. As a result of the disciplinary practices alleged above, E. Adams, G. Badan, L.F. Belinc, J.W. Bremmer, A.W. Cafone, A. Caruso, P. Cosimano, B.J. Decker, J.R. Del Russo, L. Duda, J. Evanocho, RL. Ferguson, M.J. Germek, G. Giangeruso, J. Gil, P.J. Haddick, I.

not tolled as to any employee other than Paul Meola. The court reasoned that more than three years had elapsed from the time the other employees were "counseled" about their rights and the subsequent specific naming of these employees in the amended complaint.

By their complaint, EEOC alleged that this action was commenced under *both* Sections 16(c) and 17 of FLSA, 29 U.S.C. §§ 216(c) and 217, which provide different remedies. (App. at 4). Section 16(c) provides for unpaid wages and liquidated damages when the violation is willful. On the other hand, Section 17 authorizes injunctive relief against withholding or denying LIB benefits. Only Section 16(c) requires the identification of an individual claimant in the complaint to stop the running of the statute of limitations period.

An action commenced under Section 17 is commenced for all purposes when the complaint is filed and the individual employees for whom relief is sought need not be named in the complaint. *EEOC v. Gilbarco Inc.*, 615 F.2d 985, 990 (4th Cir. 1980); *Hodgson v. Brookhaven General Hospital,* 436 F.2d 719, 722 (5th Cir. 1970). The employees *not* specifically named in the original complaint in this case could conceivably be barred from relief under Section 16(c) but are not barred from relief under Section 17. Therefore, regarding relief under Section 17, the action was commenced and the statute tolled when the original complaint was filed.

> Jenkins, M.E. Klien, S.W. Konkol, V. Korzystko, G. Koski, J.F. Kozub, P.J. Lyons, J.J. Marx, P. Meola, C. Millard, E. Miller, W.A. Moskal, C.J. Obruzut, J. Pandolfi, M.M. Pastore, R. Perrone, A. Pickman, A.F. Pirog, S. Podorski, F.V. Renn, L. Reque, I.T. Reidmiller, G. Sabol, L. Schroeder, J. Smythe, R.O. Sorel, H.R. Stanley, M. Stecher, F. Stecher, L.M. Stevenson, H. Szorstowski, D. Tyson, E. VanDuyne, A. VanDuyne, W. Vanderhee, L.M. Vitale, S.F. Vitolo, J.S. Williams, W. Soloszczak, J. Yuhasz, J. Yurkovich, B. Zietkiewicz, A. Zigarelli, K. McGinnes, S. Schlatter, E. Smole, L. Schilling, L. Cook, M. Leeming and other similarly situated employees, who were eligible for retirement, were unlawfully denied severance pay when terminated due to the closing of Defendant's Belleville, New Jersey facilities on or about April 1, 1977.
>
> (App. at 5).

Consequently, we believe the district court erred in finding on a summary judgment motion that the present action was time-barred. Westinghouse has failed to establish that there are no genuine issues of material facts in dispute. Certainly, the issue of willfulness is a factual question of critical importance to deciding the statute of limitations. Additionally, one of those factual issues is whether adequate notice was given to the employees at the counseling sessions. Thus, this case should not have been disposed of by summary judgment unless Westinghouse's other defenses are sanctioned by the ADEA.

IV. STATUTORY DEFENSES

We will now consider whether Westinghouse's actions are sanctioned under the provisions of the ADEA, even assuming, as the district court did, that the EEOC is able to make a *prima facie* case of age discrimination. As we indicated earlier, if Westinghouse has a complete defense to the EEOC's charge of age discrimination, then *a fortiori* the issues of timeliness and willfulness are irrelevant.

The EEOC claims that Westinghouse's policy on its face violates Section 4(a) of the ADEA because it subjects older employees—55 years of age and above—to treatment different than that afforded younger employees by depriving older employees of LIB on the basis of age.

Once a plaintiff in this type of suit has put forth a *prima facie* case of age discrimination, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged action. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981); *Smithers v. Bailar,* 629 F.2d 892, 895 (3d Cir. 1980); *Hagelthorn v. Kennecott Corp.,* 710 F.2d 76, 81 (2d Cir. 1983); *EEOC v. Baltimore and Ohio Railroad Co.,* 636 F.2d 1107, 1110 (4th Cir. 1980), *cert. denied,* 454 U.S. 825 (1981). Westinghouse claims that its actions are excused under Section 4(f)(1) as based on reasonable factors other than age. 29 U.S.C. § 623(f)(1). Futhermore, Westinghouse defends the denial of LIB to those individuals

entitled to early retirement on the grounds that these actions were taken in observance of the terms of a bona fide employee benefit plan, not a subterfuge intended to evade the purposes of ADEA. Thus, Westinghouse argues that its action is excused under Section 4(f)(2). 29 U.S.C. § 623(f)(2).

We must determine whether, viewing the record in the light most favorable to EEOC, Westinghouse has provided a complete defense to the charge of age discrimination and is, therefore, entitled to summary judgment as a matter of law.

A.

Section 4(f)(1) Defense

Section 4(f)(1) of the Act provides that it is not unlawful for an employer to take any action otherwise prohibited under ADEA where the differentiation is based on reasonable factors other than age. The district court reasoned that in this case there is no ADEA violation because the layoff was the result of a plant closing:

> That event laid off employees of a wide variety of ages, and with different consequences for employees of the same age. The differences in consequences are due not to age but to *other factors* in the LIB and Pension Plans.

(App. at 87) (emphasis added). These "other factors", in the court's opinion, included the level of employees' earnings and years of service with the employer. The court went on to say, however, that "[a]ge is inevitably involved and cannot be excluded as a factor in making the arrangements." (App. at 93).

Westinghouse bears the burden of going forward with evidence to demonstrate reasonable factors, other than age, justifying its action. *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978). Westinghouse asserts that the employees involved here were denied LIB benefits because of their eligibility for early retirement. However, even if this contention is supported by sufficient proof, there is authority

for our finding that eligibility for early retirement is too closely related to age to be given credence as a valid justification.[7]

Because of the close relationship between eligibility for early retirement and age, the obvious effect of Westinghouse's practice was to deny LIB to older workers who had accumulated through years of service more credit years than their younger counterparts. *Leftwich v. Harris-Stowe State College,* 702 F.2d 686, 691 (8th Cir. 1983). If eligibility for early retirement can be used to justify the denial of LIB to older employees, the purpose of the ADEA will be defeated. Congress enacted this statue "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621.

In a case not too dissimilar to the case at bar, the city of Altoona required the termination of its most senior firemen who were eligible for pension. Our court, speaking through Judge Gibbons, said: "The City attempts to justify the instant involuntary retirements, which plainly are on the basis of age, because of pension eligibility. It is well settled, however, that mere eligibility for a pension is not a defense to a *prima facie* case of age discrimination . . . The city's contention that the retirements were based on economic considerations is equally meritless, for such considerations cannot be used to justify age discrimination." *EEOC v. City of Altoona,* No. 82-5805, December 13, 1983, typescript at 8-9. In the *City of Altoona, supra,* the fire department reduced its staff, while here West-

---

7 Examples of the types of justifications deemed excusable under Section 4(f)(1) include those in the cases of DeLoraine v. MEBA Pension Trust, 499 F.2d 49 (2d Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974), and Bittar v. Air Canada, 512 F.2d 582 (5th Cir. 1975). In *Bittar,* which exemplifies the types of justifications voiced in wrongful discharge cases, the defendant-employer produced evidence of numerous instances of unsatisfactory job performance. In *DeLoraine,* the withdrawal of permission for retired engineers to return to work to satisfy an increased demand for engineers was justified or excused on the basis of a cessation of such demand. We conclude that "eligibility for early retirement" is not as analytically separable from age as are the factors advanced in the above cases. The nexus to age is simply too strong to allow it as a justification.

inghouse closed its plant; each employer acted because of economic considerations, and here, just as in *City of Altoona,* such economic "considerations cannot be used to justify age discrimination." *Id.*

In view of the fact that Westinghouse has articulated no other factor or justification to serve as a legitimate non-discriminatory reason for the denial of LIB payments under the circumstances of this case, we conclude that Westinghouse has failed to establish a Section (4)(f)(1) defense.

B.

Section 4(f)(2) Defense

Finally, we will consider whether Westinghouse has established a defense under Section 4(f)(2). Section 4(f)(2) provides that it shall not be unlawful for an employer to observe the terms of a bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the ADEA. 29 U.S.C. § 623(f)(2).[8] In establishing a Section 4(f)(2) defense, the burden is on Westinghouse to demonstrate the existence of three elements: (1) Westinghouse must have been acting in observance of the terms of (2) a bona fide employee benefit plan (3) which is not a subterfuge to evade the purposes of the ADEA.

---

8 This court notes that Section 4(f)(2) was amended in 1978 to expressly prohibit involuntary early retirement premised on age. 29 U.S.C. § 623(f)(2), as amended, Pub. L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189. Though it is arguable that the prohibition in the 1978 statute would be violated by enforcement of Westinghouse's policy of denying LIB to employees over age 55 (with 10 or more years of service and eligible for early retirement) and it might constitute involuntary early retirement by not according the employees an option as to form of benefits, we nevertheless decline to give retroactive effect to the 1978 Amendments in this case.

This court and other courts of appeals have held that these 1978 Amendments should be given prospective application only and should not apply retroactively to involuntary retirements occurring before enactment on April 6, 1978. Sikora v. American Can Co., 622 F.2d 1116,1121 (3d Cir. 1980); Jensen v. Gulf Oil Refining and Marketing Co., 623 F.2d 406, 409 (5th Cir. 1980); Smart v. Porter Paint Co., 630 F.2d 490, 497 (7th Cir. 1980). We will do likewise in this instance.

Smart v. Porter Paint Co., 630 F.2d 490, 493 (7th Cir. 1980); *See United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977); *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978); *Brennan v. Taft Broadcasting*, 500 F.2d 212 (5th Cir. 1974). Because we conclude, *infra*, that the LIB Plan was not a bona fide employee benefit plan, we do not reach the other two components of the defense.[9]

(1) *Bona Fide Employee Benefit Plan*

Westinghouse argues, and the district court agrees, that Westinghouse's LIB plan qualifies as a bona fide employee benefit plan under Section 4(f)(2) of the ADEA. Section 4(f)(2) states in pertinent part:

> It shall not be unlawful for an employer . . . to observe the terms of . . . *any bona fide employee benefit plan*

---

9 Whether or not Westinghouse acted in observance of the terms of the plans at issue here is dependent upon the proper construction of the terms and interrelationship of the LIB plan and the Pension Plan. The phrase "to observe the terms of" has been interpreted to mean that the terms of the plan must *expressly* sanction the practice or expressly give the employer the *option* of engaging in the activity. *See* Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978); Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980); EEOC v. Baltimore and Ohio R. Co., 632 F.2d 1107 (4th Cir. 1980); Marshall v. Hawaiian Telephone Co., 575 F.2d 763 (9th Cir. 1978); Cheng v. GAF Corp., 566 F.Supp. 350 (S.D.N.Y. 1982).

The district court, Westinghouse and the EEOC disagree as to the proper interpretation of these Plans insofar as the Plans give the eligible employee the option of rejecting early retirement on a plant closing.

We believe that the proper interpretation of these plans is a question to be best resolved by the company and the union by way of the arbitration process, therefore, we will not address this element of the 4(f)(2) defense.

Moreover, whether or not Westinghouse's 1976 amendment to the Pension Plan which lowered the age for early retirement for those employees laid off as a result of plant closing constituted "a subterfuge" to evade the purposes of the ADEA as alleged by the EEOC is a disputed issue of material fact. The record is silent as to Westinghouse's purpose or motive. *See* United Airlines v. McMann, 434 U.S. at 203; Smart v. Porter Paint Co., 630 F.2d at 495; Crosland v. Charlotte Eye, Ear and Throat Hosp., 686 F.2d at 215-16; EEOC v. Home Ins. Co., 672 F.2d 252, 263 (2d Cir. 1982).

> *such as a retirement, pension, or insurance plan*, which is not a subterfuge to evade the purposes of this Chapter.

29 U.S.C. § 623(f)(2) (emphasis added).

The district court concluded that the LIB Plan is "a welfare benefit plan since it provides insurance for unemployment." (App. at 77). Apparently, the underlying assumption is that the LIB Plan qualifies under 4(f)(2) merely because it provides employees with "insurance" against unemployment.

The prerequisites to qualifying under 4(f)(2), however, are much more stringent. By the express language of 4(f)(2), a plan qualifies if it is a retirement, insurance or pension plan. We are aware that the words "such as retirement, pension or insurance" were added in a descriptive sense, not excluding other kinds of employment benefit plans. *Brennan v. Taft Broadcasting Co.*, 500 F.2d at 215. Even though these words are descriptive, their description contains substance. These words are to be interpreted as indicative of the *types* of plans in which Congress intended to allow age distinctions; they are of the type whereby the cost of benefits increases with age.

The thread common to retirement, insurance and pension plans, but not found in the LIB Plan, is the age-related cost factor. The district court pointed out quite properly that:

> The typical retirement and pension plan inevitably takes account of age. This was one of the points of Justice White's concurring opinion in *United Air Lines* [*v. McMann*, 434 U.S. 192 (1977),] when he observed that all retirement plans necessarily make distinctions based on age. *The desirable goals of actuarial soundness and full funding, to help achieve which ERISA was enacted, cannot be achieved without differences that take account of age.* It was in recognition of that basic fact of life and death that § 623(f)(2) was included in the Act.

(App. at 87) (emphasis added).

In this case, the LIB Plan does not reflect age-related cost factors. Instead, the LIB Plan simply states that an employee is eligible for LIB if he has at least two years of service, has been laid off for a lack of work, and is not entitled to early retirement benefits under the Pension Plan. (App. at 251). In

order to be eligible for *early* retirement, an employee must be at least 55 years of age. Westinghouse thus denied LIB to 65 employees, otherwise eligible for it, because it considered them entitled to early retirement. Unlike retirement, pension and insurance benefits which are based upon age-related cost factors, the benefits derived from this Plan are based solely on an employee's length of service—at least two years—and the occurrence of a layoff.

We simply can glean no age-related cost factor on the face of the LIB Plan which justifies Westinghouse's actions. The "desirable goals of actuarial soundness and full funding" are not necessarily advanced by the exclusion of LIB to individuals qualified for early retirement.

Furthermore, the fact that the LIB Plan is tied to Westinghouse's Pension Plan does not negate the fact that it is more analogous to a "fringe benefit" than to the types of employee benefit plans covered under 4(f)(2). Fringe benefit plans unrelated to the age cost factor are not included in the 4(f)(2) exception.

The LIB Plan in this case is similar to the city's sick leave plan in *Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982). The Fifth Circuit held that the state's retirement plan was "bona fide" but that the city's policy of denying accrued sick leave pay to city employees whose retirement was not covered by the state retirement plan, was not part of a bona fide employee benefit plan. The court stressed the independence of the sick pay policy from the state retirement pension, or insurance plan. 664 F.2d at 1272. The *Alford* court also addressed the city's argument that the sick leave payment policy was tied to length of service and held that the city

> may not deny an entire class of older employees—those hired after age fifty—*any* participation in a *fringe benefit* unrelated to a bona fide "retirement, pension, or insurance" plan simply by artificially trying to tie the benefit to such a plan.

664 F.2d at 1272 n.12 (emphasis added).

In the case at bar, Westinghouse's Pension Plan is "bona fide" to the extent that, viewing it alone, it is genuine and

actually pays benefits. *United Airlines v. McMann*, 434 U.S. at 446; *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 212, n.3 (4th Cir. 1982); *Marshall v. Hawaiian Telephone Co.*, 575 F.2d at 766. The LIB Plan, however, is functionally independent of the Pension Plan although interrelated in one respect—ineligiblity for LIB is dependent upon eligibility for early retirement. The mere fact that the benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB, however, does not merge the two plans into a single "coordinated benefit plan." *EEOC v. Borden's Inc.*, 551 F.Supp. 1095, 1099 (D.Ariz.), *appeal docketed*, No. 83-1701 (9th Cir. Feb. 17, 1983). On the contrary, this interaction shows that the LIB Plan is not an integral part of the Pension Plan.

Consequently, this court concludes that the record does not support the application of the Section 4(f)(2) exception as regards to this element.

V.

In short, we conclude that genuine issues of *material* fact remain as to whether Westinghouse's policy of denying LIB to older workers was a *willful* violation of ADEA, calling into play the three-year statute of limitations and whether the employees were notified of the plant closing. Additionally, Westinghouse simply has not established a complete defense under either Section 4(f)(1) or 4(f)(2) on the record before this court. Thus, this case will be remanded to the district court on the issues of willfulness, notice and the applicable statute of limitations.

For the foregoing reasons, we will reverse the judgment below and we will remand the case for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Memorandum Opinion of the United States District Court, dated March 16, 1982

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
NEWARK, NEW JERSEY 07102
FTS# (8) 341-2517

Vincent P. Biunno
Judge

(201) 645-2517
(201) 642-2451

MEMORANDUM

Re: EEOC v. Westinghouse Civ 80-853

When the parties last appeared for oral argument, the court raised the question whether, under a proper interpretation of the contract, the employees who are the subject of the suit had an option, at the choice of each, to apply for early retirement benefits under the provision applicable to a plant closing, or to take Layoff Income Benefits (LIB), with a lump sum payment related to length of service.

Such an option would in no way deprive the employee of vested benefits under the plan, nor could it conceivably amount to age discrimination since the choice was his to make.

Supplemental briefs on this matter of construction were requested. They were slow in coming, and a reply has just been received. The supplemental briefs do not address the question raised.

On several reviews of the documents involved, none of which is in dispute, the court is satisfied that their clear and only construction is that in the circumstances involved, the subject employees did have that choice, and in no event was any entitled to early retirement benefits due to a plant closing, plus a lump sum benefit under the LIB provisions. They could have one or the other but not both.

Under these circumstances, the court will grant the motion by defendant for summary judgment in its favor and deny plaintiff's motion for partial summary judgment.

If, as may have been the case, the subject employees were told that they had to take the early retirement and could not choose the LIB benefits, this was due to an incorrect interpretation of the documents. In that event, nothing can be done in this case because EEOC, the only plaintiff, has no authority to sue on behalf of the subject employees for a breach of contract.

If the employees are represented by a collective bargaining agent as they seem to be, that representative would need to take the necessary steps to advance the claim. If not, then each subject employee could seek his own remedy.

The adjustment would not be difficult to make. The subject employees need only be given the option now to take the LIB benefits instead of early retirement. For those who choose not to exercise it, nothing further would be called for. For any who choose to exercise it, he would be obliged to repay the installments received under early retirement, in exchange for the LIB benefit, both to be adjusted for interest at, say, 12% and only the net amount paid in one direction or the other.

Since considerable time has elapsed since the motions were argued, the court employs this simplified method to announce its ruling. A more detailed opinion will be filed as early as time permits.

Submit order accordingly.

March 16, 1982

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: John J. Lokus, Esq.
c/o EEOC, 127 N. Fourth Street, Philadelphia, Pa. 19106
U.S. Attorney
Thomas L. Morrissey, Esq.

APPENDIX C

Opinion of the United States District Court, dated July 29, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil 80-853

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—VS.—

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant.

Appearances:

Michael J. Connelly, Esq., General Counsel (Washington) by John J. Lokos, Esq., Trial Attorney (Philadelphia), for plaintiff.

Carpenter, Bennett & Morrissey, Esq., by Thomas P. Morrissey, Esq. and Rosemary A. Hall, Esq. (Newark) for defendant.

OPINION

BIUNNO, Senior District Judge.

This is a suit for alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC § 621, et seq.

After pretrial discovery, an amended complaint and answer thereto, and the submission of trial briefs and proposed findings of fact and conclusions of law, EEOC filed a motion for partial summary judgment (i.e., on the issue of violation) and Westinghouse responded with a cross-motion for summary judgment on a number of defenses.

At the initial hearing, the court expressed some reservations about taking up the issues on the basis of excerpts from separate but interrelated documents, one being a "Pension and Insurance Agreement" of 1976, and the other being the Westinghouse Pension Plan of 1976. It indicated that it would prefer to study both documents in full, along with the corresponding previous versions of 1966.

It turned out that both documents were interrelated with the underlying collective bargaining agreement between Westinghouse and the I.U.E. the exclusive bargaining representative. The court ended up with two sets of documents, presented as Joint Exhibits.

Exh. J-1 is the collective bargaining agreement of 1966, and the Pension and Insurance Agreement negotiated and agreed to at the same time.

Exh. J-2 is the Westinghouse Pension Plan in full text as of 1966.

Exh. J-3 corresponds to J-1 but is the pair of agreements negotiated and agreed to in 1976, and was in force when the alleged violation occurred.

Exh. J-4 corresponds to J-2, but is the full text of the Westinghouse Pension Plan as it stood as the result of the 1976 negotiations and agreements, and was in force when the alleged violation occurred.

Both Exh. J-2 and J-4 alsc include a pamphlet summarizing the main features of the pension plan, but there is no question in this case that anything other than the full text of the plan is controlling.

Although the 1976 Pension Plan, in Section 25, reserves to Westinghouse the right to amend the Plan, to discontinue contributions or to terminate the Plan (subject to conditions required to comply with ERISA), this reservation is subordi-

nate to the covenant of Westinghouse, in Art. I, sec. 4(b) of the collectively bargained Pension and Insurance Agreement, that it will not discontinue the Pension Plan or make any amendment that would adversely affect the rights thereunder of the employees, nor suspend or reduce company contributions, during the term of the Agreement.

Both the original complaint and the amended complaint allege, in substance, that Westinghouse willfully violated sec.4(a) of the ADEA, 29 USC § 623(a) by its failure to provide "severance pay" to terminated employees age 55 and older who had 10 years service with the Company when it closed its Belleville, N.J. plant on April 1, 1977 and who were then eligible for retirement benefits.

The original complaint named a single employee in that category, and a number of "John Doe" employees similarly situated. The amended complaint names 65 individual employees and no "John Does".

After careful review of the full text of the documents Exh. J-1 through J-4, the court suggested at a later argument that the applicable provisions clearly did not allow an employee to have both Layoff Income and Benefits under Article VI of the Pension and Insurance Agreement and retirement payments under the Pension Plan in light of the general layoff due to the closing of the Belleville plant. It suggested that a correct reading of the interrelated instruments meant that an employee over 55, with 10 years service, who was laid off due to the plant closing, was put to his own choice whether to take early retirement and begin receiving payments for retirement under the Pension Plan, or whether to exercise one of the options under the Layoff Income and Benefit plan, which was to sever all relationship with the Company, relinquish his recall and service rights, and take a lump sum payment equal to one week's pay for each full year of credited service (less any part of that total that had been applied to layoff income on some earlier layoff and not meanwhile repaid or rebuilt).

Aside from the option to sever all relationships and relinquish recall and service credits in order to draw a lump sum

payment (which, incidentally is not available for every layoff but only under specified conditions), the Layoff Income and Benefit plan is an unemployment benefit plan designed to supplement unemployment compensation benefits to bring the combined payment up to 60% of the level of his "week's pay" (a defined term), and to continue such payments after unemployment compensation had run out (until the particular employee's maximum credit was used up).

The court suggested that if this was the correct reading, there would be no conceivable ADEA violation because the choice between one course or the other was the employee's choice, not the employer's. Supplemental briefs were requested based on that reading.

After the supplemental briefs and responses were in, the court was of the view that the question it had raised had gone unanswered, and on March 17, 1982 it filed a brief memorandum to the effect that the suggested reading was the correct one, that there accordingly could not be an ADEA violation, and ruled that EEOC's motion would be denied while the Westinghouse motion would be granted. It promised a fuller articulation as soon as the press of other work allowed. No order was entered at that time.

EEOC then filed a motion to alter or amend the memorandum. This amounted to an application for reconsideration and reargument, and was timely filed. Further briefs and responses were submitted by both sides, and further argument heard.

It was evident from that argument that EEOC agreed that the subject employees could not have both LIB and early retirement payments at the same time under the facts of this case. Westinghouse also agreed that an employee could not have both, but also was of the view that so long as the employee was eligible to begin receiving payments for early retirement, he could not exercise the LIB option for a lump sum payment. It also urged that the court deal with other defenses pressed to support its motion for summary judgment.

The present opinion is the fuller articulation contemplated when the earlier brief ruling on one issue was filed. It replaces

that earlier memorandum since some aspects have been made clearer by the further briefing and argument, and another review of the file and the exhibits. It also deals with other defenses raised and argued.

1. *Statute of limitations.*

The ADEA does not itself spell out the applicable statute of limitations. Instead, the Congress merely provided, in 29 U.S.C. § 626(e), that "Section[s]6 * * * of the Portal-to-Portal Act of 1947" 29 U.S.C. § 255 "shall apply to actions under this Act."

That embodied statute provides that any action may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

This action was commenced when the original complaint was filed on March 28, 1980 as to the one employee then named. His situation will be considered first. Since a "willful" violation is alleged, the 3-year period will be considered first.

The affidavit of John F. Williams, submitted in support of the Westinghouse motion, shows that Mr. Meola, the only named employee in the original complaint, was counselled on February 2, 1977 that he was ineligible for LIB. There is no affidavit or other fact source to contradict this fact, or to raise any issue for trial in respect to the date.

That date is more than 3 years before the original complaint was filed on March 28, 1980, and thus is barred by the longer statute of limitations set out in 29 USC § 255, so long as it is the date on which the "cause of action accrued."

EEOC argues that the cause of action did not accrue until April 1, 1977 when the Belleville plant closed and Mr. Meola was laid off and put on early retirement. It says that not until April 1, 1977 would Mr. Meola have been entitled to be *paid* any LIB benefit, and so the complaint was filed within three years.

There are several difficulties with EEOC's position. In the first place, if Mr. Meola were entitled to claim LIB, he would have had to choose the option for a lump sum payment, in which case he could not have begun to draw payments on early retirement, as noted above. In fact, both the complaint and amended complaint are drawn on the incorrect assumption that Mr. Meola was entitled both to choose a lump sum payment and to draw payments for early retirement, which is not the case. This erroneous assumption began at the start, when Mr. Meola's son submitted a charge to the Department of Labor on April 14, 1977 (this is when administration of ADEA was in that Department and before reassignment to EEOC). That charge says, in pertinent part:

> "* * * Employees eligible for early retirement apparently are not receiving severance pay[sic]. * * * On the surface, this would appear to violate ADEA with regard to workers who, *although receiving pensions*, are not paid severance benefits." (emphasis added). (Exh. N to EEOC brief for summary judgment).

Since Mr. Meola was told on February 2, 1977, that he would be put on early retirement and was ineligible for LIB, the alleged ADEA violation (if there were one) occurred then and so the "cause of action" arose then.

The core of the ADEA applicable to this case is the declaration of "unlawful" employer practices, 29 USC § 623(a). This embraces discrimination "against any individual in respect to his compensation, terms, conditions, or privileges of employment" or to "discharge any individual" because of such individual's age.

Thus, what the ADEA forbids is to *discriminate because of age.* If there were discrimination here on account of age, it occurred when Meola was told that he would have early retirement and was ineligible for LIB. That was on February 2, 1977, more than 3 years before the complaint was filed.

The analysis is the same as that employed by the Supreme Court in *Delaware State College v. Ricks,* 449 U.S. 250 (1980), a case from this Circuit. In that case, which involved a charge

of race discrimination in employment, both under 42 USC § 2000e (title VII) and under 42 USC § 1981, Ricks was told on June 26, 1974 that the college Board of Trustees formally voted that day to deny him tenure. He remained in employment until June 30, 1975 when his non-tenured employment ended.

In the case of the Title VII claim, the requirement was that a complaint be filed within 180 days "after the alleged unlawful employment practice occurred". In the case of the § 1981 claim, which was governed by Delaware law, the provision was that "No action . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action;" 10 Del.C. § 8106 (see 605 F.2d at 713).

For both claims, the Supreme Court ruled that the several periods applicable (180 days and 3 years) ran from the date Ricks was told of the Board action to deny him tenure, even though he continued to be employed for more than a year thereafter as a non-tenured teacher.

There is not, and cannot be, any claim here that Mr. Meola's layoff was a discriminatory act or practice in violation of the ADEA. The plant was closed and all employees were laid off (except, perhaps a security staff), and they were of all ages.

This is not a case like *EEOC v. Baltimore etc. Co.*, 632 F.2d 1107 (CA 4, 1980). There, two railroads with consolidated management faced severe financial difficulties as the result of a nationwide coal strike in 1971. To meet the problem, the company decided to reduce the size of its work force. First, they reduced the number of workers subject to collective bargaining agreements. That step was not challenged in the case. Next they reduced the number of workers not subject to collective bargaining agreements, and this was done by selectively terminating 142 employees who were at least 60 years old with 20 years' service, or at least 62 years old with 10 years' service. All of them were qualified for retirement pensions, and were involuntarily retired starting in October, 1971. Under the pension plan, only those who reached 65 were subject to compulsory retirement. Those eligible to retire earlier were not compelled to retire so far as the plan was concerned, but it was

shown that such early retirements were compelled as an inherent right of management in managing the business, in managing personnel, a right that the company had "irrespective of the plans." Thus, in that case, the company thinned out its work force by selecting employees according to age.

Nothing of that sort appears in the present case. There is no dispute that the entire Belleville plant was closed down and all employees laid off.

Thus, the core of the alleged discriminatory practice is the denial of LIB, not the layoff. If it violated the Act, that event occurred, as in *Ricks*, when Meola was told that he would be put on early retirement and was not eligible for LIB. If that was a prohibited practice, the violation occurred and the cause of action accrued, on that date as it did in *Ricks* for application of the Delaware 3-year statute as well as for the Title VII claim.

The same result follows for all other employees named in the Amended Complaint, which was filed March 3, 1981. As the Williams affidavit shows, and it is in no way controverted, every one of the named plaintiffs (except two who were not retired) was told, as Mr. Meola was, that they would be placed on early retirement, and that they were not eligible for LIB, on various dates specified, the earliest being January 13, 1977 and the last ones being on March 16, 1977. All but 3 were so told in January and February, 1977, and all were so told more than three years before the original complaint was filed.

Of course, if the 2 year period applies under 29 USC § 255, the original complaint was more than a year late. However, it is not necessary to select between the 2 and 3 year periods, which turns on whether the alleged violation was "willful", because the result is the same in either case.

While the complaint alleges willful violations, no evidence in that regard was submitted on the motions for summary judgment except to the extent that Westinghouse presented proofs to show there was no unlawful practice at all. If "willful" violations were to be considered, both for statute of limitations purposes and for the purpose of claiming liquidated damages,

29 USC § 626(b), such an issue seems to be one for trial rather than motion. However, the bar of the 3-year statute renders the issue moot for both purposes.

2. *The documents.*

A collective bargaining agreement was entered into between Westinghouse and I.U.E. as of October 1, 1950. It embraces all matters then negotiated and agreed to between the employer and the union on a company wide basis for all employees for whom the Union, or one or another local of the union, is the certified collective bargaining representatives.

This agreement, which may be regarded as a national agreement for Westinghouse was evidently worked out by a committee of 12 on each side. It is retained as the basic, underlying set of terms and conditions for the entire company, including such broad matters as strikes, stoppages and lockouts, union shop provisions (subject to compliance with local laws), dues checkoff, certain broad aspects of wages (but not wage schedules), hours of work, overtime, holidays and vacations, seniority, leaves of absence, grievance and arbitration, and the like.

Wage schedules are negotiated locally, and other details are handled by local unions, including the processing of grievances but arbitration is handled on a national basis by I.U.E.

The 1950 Agreement is periodically modified by adjustments negotiated by the committees of 12 on a company wide basis, and these appear as a "supplement", such as the 1976 Supplement to the 1950 Agreement, which dealt with certain increases in rates of pay negotiated for the company as a whole, including a set of formulas for cost-of-living increases, and the like.

Changes in provisions of the 1950 Agreement are incorporated within the body of that document, which is evidently re-executed at the same time as each Supplement.

The combination of the 1950 Agreement as modified and the current supplement is followed by an "Appendix" which lists the location and identity of each local bargaining representative, and describes the composition of the employees included

in that bargaining unit. For the 1976 documents, there are 41 locals and units listed.

There then follows an Appendix B, listing locations and representatives at which the "union shop" provisions apply, and the original effective date of that status (or the date of certification).

At the time of each national or companywide negotiation over the 1950 Agreement and its current supplement, there is negotiated a separate but related document, the "Pension and Insurance Agreement", between Westinghouse and I.U.E. The locals are covered, but this agreement is company-wide with no provision for local supplements.

The subject dealt with embraces employee benefit plans, both welfare benefit plans and pension benefit plans. These terms are as defined by the Congress, first in the Welfare and Pension Plan Disclosure Act of 1958, and then by the Employment Retirement Security Act of 1974. For the definitions, see 29 USC § 302(1) and (2) (WPPDA) and 29 USC § 1002(1) and (2) (ERISA). Both definitions include unemployment plans, such as LIB, under "welfare benefit plans".

The 1976 Pension and Insurance Agreement by Art. I, requires the company to put into effect an "insurance plan", Section 2(a) and (b), to make available a "pension plan", Section 2 (c) (d) and (e), to make available a "savings plan", Section 2(f) and (g), and to put into effect a "personal accident insurance plan", a "disability benefit plan", a "dependent life insurance plan", and an "in-hospital indemnity plan", Section 2(h) through (l). The "insurance plan" evidently includes coverages for life insurance, accidental death or dismemberment, accident and sickness, personal hospital expense, personal surgical, major medical, hospital expense and the like, see Art II, Section 3(d).

After provisions dealing with one or another of these plans, Article VI establishes the Layoff Income and Benefit plan (LIB) which is the focus of this lawsuit, and which will be reviewed in some detail later. It is sufficient for the moment to observe that it is designed as a supplement to unemployment

compensation benefits in the event of layoff for lack of work. As EEOC insists, it is not a "pension plan" as that term has been defined by both WPDA and ERISA, but as EEOC overlooks, it is clearly a "welfare plan" as defined in both statutes.

It is followed by Article VII, dealing with an educational opportunity program providing tuition and fee benefits for training courses to maintain or improve skills for the job or for career development within the company.

There are no doubt other instruments in existence in respect to the various benefit plans dealt with by the agreement, and a number of them are referred to in it. They are not among the exhibits supplied except for the pension plan as it stood under the 1966 agreement (Exh. J-2) and as it stood under the 1976 agreement (Exh. J-4).

The pension plan, and the LIB plan expressed in Article VI, read in the context of all the agreements, contain the provisions mainly to be considered to resolve the issues raised.

It should be noted, too, that all these plans and their terms are the result of collective bargaining. The provisions of the bargained agreement for the pension plan are especially worth noting. These are found at Article I, Section 2 (c) (d) and (e) of the 1976 Pension Plan and Insurance Agreement.

Paragraph (c) is the agreement of the company to make the pension plan as negotiated available, but the agreement is subject to approval of (1) the Board of Directors and (2) the Commissioner of Internal Revenue.

Paragraph (d) requires that the negotiated pension plan is to be submitted to the Board within 30 days, and if approved then to the Commissioner, and if approved it is to take effect.

Paragraph (e) specifies that if the Board fails to approve the negotiated plan, then under a specified time schedule "the Company and the Union shall be obligated to meet to negotiate solely with respect to the subject matter of the Pension Plan . . ." A like provision is found in paragraph (g) for the savings plan, which also is subject to approval by the Board and the Commissioner. These provisions emphasize the collective bargaining nature of the pension plan.

It should also be observed that there is interplay between the Pension Plan and other collectively bargained agreements. For example, Section XII of the 1950 basic collective bargaining agreement, in dealing with seniority, defines "accumulated length of service" in terms of the years, months and days accumulated as "Credited Service under the Westinghouse Pension Plan". It also ties in with LIB, by excluding credit for service "that was relinquished by his election to receive the Lump Sum Option payment provided under the Layoff Income and Benefits Plan".

Similarly, the LIB plan, in defining an "eligible employee", refers to one "who is not entitled to early retirement, as specified by the Westinghouse Pension Plan".

Also, the Pension Plan, in Section 2, C-3 and D-2, ties in with the LIB plan insofar as the making of a Lump-Sum payment related to length of service solely because of layoff bars eligibility for early or selected retirement, and ties in with the basic collective bargaining agreement insofar as the existence of contractual employment rights at another Company location, or the offering of employment at another Company location, bars retirement eligibility.

These, and other interlocking provisions as well as the recitals at the start of the Pension and Insurance Agreement, emphasize the fact that the content and terms of the basic collective bargaining agreement as well as of the Pension and Insurance Agreement (including the LIB plan) and the various plans, such as the pension plan, are not unilaterally determined by the employer but are the consequence of collective bargaining. For that reason, the various interlocking terms are not only to be read together but are to be afforded the deference due to such agreements in the interests of labor peace, the polestar of federal labor law as developed by the federal courts.

In related contexts the Supreme Court has taken pains to emphasize the considerable weight to be given to the substantive terms of a collective bargaining agreement. In *United Mine etc. Funds v. Robinson*, ____ U.S. ____, 71 L Ed 2d 419

(1982), it rejected a challenge to the terms of alterations in eligibility and benefit levels for health coverage under trusteed employee benefit plans where those terms were fixed by a collective bargaining agreement to which the trustees were obliged to adhere. [Challenge to terms based on alleged violation of § 302(c) (5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c), which forbids transfers between employers and employee representatives, with an exception for payments to a trust fund established by the representative "for the sole and exclusive benefit of employees", etc.].

Similarly, in *American Tobacco Co. v. Patterson*, ____ US ____, 71 L Ed 2d 748 (1982), the court rejected a contention that seniority systems adopted or modified after the enactment of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq., were not protected by the provisions of § 703 (h) of the Act, 42 USC § 2000e-2(h). It noted that its earlier rulings in *Teamsters v. U.S.*, 431 U.S. 324 (1977), in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) and in *United Air Lines v. Evans*, 431 U.S. 553 (1977) established that § 703 (h) on its face immunizes all bona fide seniority systems, with no distinction between those adopted before or after its effective date. It observed that seniority provisions are universally included in collective bargaining contracts, and that the collective bargaining process "lies at the core of our national labor policy." It noted that Congress was well aware in 1964 that the purposes of Title VII inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over "the substantive terms of collective bargaining agreements," and that Congress struck a balance between those policies in enacting § 703(h). The Court declined to upset that balance.

3. *The pertinent ADEA provisions.*

The prohibitory provision of ADEA involved in this case declares that:

> "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any indi-

> vidual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;" 29 USC § 623(a) (1). (1967)

The same section, as part of the definition of forbidden conduct, also provided that:

> "It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age; (2) to observe the terms of a bona fide employee benefit plan, such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this Act. . ." 29 USC § 623(f) (1967)

It should be observed that at the time (1967), the only significant federal statute dealing with employee benefit plans (other than provisions of the Internal Revenue Code dealing with whether any such plan was "qualified" for income tax purposes) was The Welfare and Pension Plan Disclosure Act (1958) (WPPDA), which divided employee benefit plans into two classes: welfare benefit plans and pension benefit plans. See 29 USC § 302(1) and (2), repealed. Pension plans were defined as those providing retirement benefits, including profit-sharing plans providing benefits at or after retirement. Welfare plans were defined as those providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness, disability, death or unemployment.

WPPDA was merely a reporting and disclosure Act; it did not purport otherwise to regulate any employee benefit plan. That change occurred with ERISA, 29 USC § 1001, et seq. P.L. 93-406, September 2, 1974. Its definitions are much the same, see 29 USC § 1002 (1), (2) and (3).

Both the LIB plan and the Westinghouse Pension Plan are employee benefit plans, the first being a welfare benefit plan since it provides insurance for unemployment, and the other being a pension benefit plan. Both are within § 623(f).

The interplay between § 623(a)(1) and § 623(f) was considered by the Supreme Court of the United States in the first case

involving the Act that came before it, *United Air Lines v. McMann,* 434 U.S. 192 (1977).

The majority opinion in that case held that on its face, and without need to look to legislative history, the Act did not forbid the involuntary retirement of an employee who reached his 60th birthday when that requirement was in accordance with a retirement plan. The plan was regarded as bona fide in that it actually existed and paid pension benefits, and the court held it could not be claimed to be a plan adopted as a "subterfuge" when it had been established in 1941, long before the 1967 enactment. It rejected any *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the "subterfuge" language of the Act.

Justice Stewart concurred in the judgment on the ground that since the plan was bona fide, it was not possible for it to be a subterfuge when adopted long before the 1967 act was even contemplated, and would address no other questions discussed in the majority opinion.

Justice White concurred in the judgment and with Justice Stewart. He differed to the extent that he felt that the question of "subterfuge" should be examined in terms of the maintenance of the plan after the 1968 effective date of the Act. He, too, found no support for any requirement that the employer be called upon to show "some economic or business purpose". He read the intent to be to exempt all retirement plans—including those whose only purpose is to terminate the services of older workers—as long as the benefits they pay are not so unreasonably small as to make the "retirements" nothing short of discharges. He regarded the no-subterfuge requirement as merely a restatement of the bona fide requirement.

He pointed out that all retirement plans necessarily make distinctions because of age, and so felt that the subterfuge language could not have been intended to impose a condition which almost no retirement plan could meet. He would have regarded the exception as protecting action taken pursuant to a retirement plan which is designed to pay substantial benefits, without regard to its adoption before the Act.

Two members of the Court dissented in an opinion by Justice Marshall. They regarded the exemption as capable of supporting two interpretations: one, to allow involuntary retirements (as held by the majority) and two, to allow different treatment of older employees only with respect to the benefits paid or available under employee benefit plans, including pension and retirement plans.

This court, of course, is obliged to follow the law as laid down by the majority in that case.

4. *The LIB and Pension Plans.*

The issue in the present case arises out of the fact that among the various employee benefit plans provided for Westinghouse employees, there is an insurance plan to supplement unemployment compensation, and it is interrelated in some respects with recall rights and service credits (seniority) under the basic collective bargaining agreement, and with the pension plan as well.

This insurance plan to supplement unemployment compensation is rather complex and will be reviewed in some detail later. For present purposes it is sufficient to note that it establishes a credit, called a "Total Maximum Sum," for each employee, equal to one week's pay (as defined) for each full year of service with the Company. That credit is made available for receiving "Layoff Income and Benefits", according to which of a number of options is selected by the employee, if he is "eligible" to receive them.

At the time of the pertinent events here, an "eligible employee" was defined as an employee

> . . . with two (2) or more full years of such service
> . . . who is not entitled to early retirement, as specified in the Westinghouse Pension Plan, and
> . . . [who] is not on disability or leave of absence
>
> who is laid off through no fault of his own for lack of work occasioned by reasons associated with the business (such as

> . . . changed customer ability and willingness to buy as reflected in adjusted production requirements
> . . . changed manufacturing processes
> . . . product discontinuance or
> . . . plant closing) and
>
> who has not returned to work.
>
> (Art VI, Section 1(a), of the "Pension and Insurance Agreement" entered into between Westinghouse and the I.U.E. July 12, 1976, Exh. J-3).

The Westinghouse Pension Plan, which contains both non-contributory and contributory portions, defines the conditions of eligibility for retirement and pension at a "normal", "early" and "selected" retirement date. References hereafter are to the Plan, Exh. J-4.

Normal retirement date is the first day of the month following the month in which the employee's 65th birthday occurs. For example, if the 65th birthday falls on any date in May, from the 1st to the 31st, the defined normal retirement date is June 1st. Pension payments begin on that date, and the employee is considered terminated the day before (May 31st). Employees so retired receive a pension so long as they were employed on the day before the retirement date and began employment before the first day of the month following his 60th birthday. Section 2-A.

The Plan definitions using the first day of a month are evidently intended to simplify administration and while they must be used in applying the Plan, they are not pertinent to any issue here. For easier understanding, the court will merely refer to specified ages such as age 65 or age 60, with the understanding that the references to the first day of a month are being omitted.

Early retirement may occur in several ways.

1. An employee with at least 10 years of credited service may retire at any time after age 60 and before age 65 on reduced pension. He must apply for early retirement at least 30 days

before the desired date, except that in the event of a layoff, the 30 day requirement is waived. To preserve benefits for a surviving spouse in the event of death before retirement, a death after age 50 but before age 65 is treated as an early retirement at death. Section 2-C-1.

2. If an employee has at least 10 years but less than 30 years credited service, and is laid off after age 59 and before age 60, he is allowed to take early retirement at age 60 on reduced pension. He must apply before his 60th birthday to have this option. He is not eligible for this option if (a) he has returned to regular service before his 60th birthday or (b) he has received a lump sum payment related to length of service solely because he was laid off or separated. Section 2-C-2.

3. If an employee has at least 10 years of credited service, and is laid off *as a result of a Location Closedown* after age 55 and before age 60, he is allowed to take early retirement at reduced pension. He must apply within 60 days after the layoff. He is not eligible for this option (a) if he has contractual employment rights at another location or (b) if he is offered employment at another location or (c) if a lump-sum payment related to his length of service has been made solely because of the layoff. An employee who qualifies for early retirement under 2, above, may retire under that provision instead of this one. Section 2-C-3.

Another form of early retirement is called "Selected Retirement". There are two versions of this, both limited to employees having at least 30 years of credited service.

1. An employee with at least 30 years of credited service may retire anytime after age 58 and before age 65 at a reduced pension. He must apply for selected retirement at least 30 days before the desired date, except that in the event of a layoff, the 30 day requirement is waived. To preserve benefits for a surviving spouse in the event of death before retirement, a death after 30 years' service is treated as an early retirement at death. Section 2-D-1.

2. If an employee has at least 30 years of credited service, and is laid off *as a result of a Location Closedown* after age 55 and before age 60, he is allowed to take selected retirement at a reduced pension. He must apply for this retirement within 60 days of the layoff. He is not eligible for this option (a) if he has contractual employment rights at another location, or (b) if he is offered employment at another location, or (c) if a lump-sum payment related to his length of service has been solely because of the layoff see 2-D-2.

There is another provision in the Plan for deferred retirement. This only applies under exceptional circumstances and also depends on a request by the employer to continue in active service after age 65 and the agreement of the employee to do so. It is not involved in the present case.

Analyzing the above provisions from another perspective, they spell out a plan under which:

1. Normal retirement is at age 65, with a pension so long as employment began not later than age 60.

2. Employees with at least 10 years service may take early retirement between 60 and 65 at reduced pension. If death occurs after age 50, benefits for a surviving spouse are protected.

3. Employees with at least 30 years service may take early retirement between 58 and 65 at reduced pension. Protection of benefits for a surviving spouse arises with the 30 years service even if death is before age 50.

4. Employees with at least 10 years service may take early retirement at age 60, at reduced pension, but only if laid off (for any reason) between ages 59 and 60. This option does not apply if the employee returns to work (after the layoff) before age 60. It also does not apply if he received a lump sum payment related to length of service solely because he was laid off or separated. Notice requirements are waived in case of layoff.

5. Employees with at least 10 years service who are laid off *as a result of a Location Closedown* after age 55 and before age 60 may take retirement at reduced pension. He must apply within 60 days of the layoff, and the retirement takes effect on the first day of the month after he applies. Such employees may not retire under this provision (a) if they have contractual employment rights at another location; or (b) if they are offered employment at another location, or (c) if they have been paid a lump-sum related to length of service solely because of the layoff.

The issue posed in this case arises out of the bar to early or selected retirement, otherwise available to an employee between the ages of 55 and 60, in the event of the payment of a lump sum related to length of service, solely due to a layoff, and a corresponding provision in the Pension and Insurance Agreement controlling eligibility by way of unemployment insurance supplements. (the LIB plan)

All of the employees on whose behalf EEOC sues were laid off as the result of a Location Closedown. All are receiving retirement pension payments, and so all are taken to have been at least age 55, with at least 10 years' service at the time and not to have had contractual employment rights at another location and not to have been offered employment at another location.

They did not, however, receive what EEOC calls "severance" payments or benefits, and it is this item that forms the basis for the ADEA claim.

In fact, there is no such simple item as "severance" payments or benefits. Rather, there is a benefit plan to supplement unemployment insurance, mentioned briefly above, which must now be examined in some detail. References are to the Pension and Insurance Agreement, Exh. J-3, mentioned above.

That agreement is a collectively bargained agreement entered into by Westinghouse and I.U.E. at the same time as and collateral to the main collective bargaining agreement that deals with the usual subjects. It deals with a variety of different

kinds of employee benefits, such as the pension plan (discussed above), life insurance, accident insurance, hospital insurance, a savings plan, and the like. Taken together they are all employee benefit plans, most being welfare benefit plans and one being a retirement and pension plan, as those terms were defined by WPPDA, 29 USC § 302 and now by ERISA, 29 USC § 1002.

The plan at issue is a plan for what is called "Layoff Income and Benefits", and it is spelled out in Art VI of the Pension and Insurance Agreement of 1976.

The Layoff Income and Benefit plan applies only when there is a layoff of an employee

. . . who has 2 or more full years of service
. . . who is not entitled to early retirement as specified in the Westinghouse Pension Plan
. . . who is not on disability or leave of absence
. . . who is laid off through no fault of his own for lack of work, and
. . . who has not been recalled to work.

An employee who meets these conditions is an "Eligible Employee" for Layoff Income Benefits (LIB).

He will receive benefits in accordance with stated options, from a Total Maximum Sum available to him equal to 1 week's pay for each full year of his service with the company. The amount of a "week's pay" is expressly defined for salaried, daywork, and hourly paid incentive workers.

The total maximum sum is also affected by prior layoffs and rehires subject to repayment and rebuilding of the amount after rehire, but in any event will be no less than 4 weeks' pay.

In the special case of a layoff which the Company management believes will last more than 6 months, an employee eligible for LIB may elect Option (a) under Section 3. To exercise that option he must, within 60 days after the layoff,

. . . permanently sever his relationship with the Company,
. . . relinquish recall rights and service rights (except as may exist under the Pension Plan).

Upon doing so, he will receive the Total Maximum Sum available to him in a Lump Sum Payment (together with vacation pay and any other sums due him) [Note: It is this Lump Sum option, if exercised, that EEOC evidently refers to as "severance pay".] If he has vested rights under the Westinghouse Pension Plan, he may elect not to withdraw his pension contributions, if any.

If the layoff is expected to exceed 6 months and an eligible employee does not exercise Option (a) within 60 days of the layoff, or if the layoff is not expected to exceed 6 months, then the Lump Sum Payment provision in Option (a) is not activated and is not required to be made. The same is true of employees laid off who are not eligible employees as defined in Section 1(a), i.e., less than 2 years of Credited Service, or entitled to early retirement under the Pension Plan.

Where Option (a), if applicable, is not exercised, or where Option (a) is not applicable, an eligible employee may apply for weekly benefits under Option (b). Under this option, he is paid a benefit in an amount sufficient to make up the difference between what he receives as unemployment compensation payments and 60% of his week's pay. If his unemployment compensation payments run out, then he is paid under the Plan 60% of his week's pay, until the Total Maximum Sum is exhausted, or until 12 months have elapsed since his layoff. These benefits to supplement unemployment compensation are subject to various limitations:

. . . they are not paid for any "waiting week"

. . . they are not paid for any week in which he is entitled to payments (a) for accident and sickness benefits, or (b) for total and permanent disability benefits (both under the Westinghouse Insurance Plan); or (c) under any worker's compensation law; or (d) under any temporary disability law

. . . they are not paid for any week in which he is entitled to weekly retraining allowances under State or federal law

. . . they are not paid for any week in which he is not in fact unemployed

> . . . they are not paid after age 60 to an employee who had at least 10 years' service and was laid off on or after his 59th birthday.

Under Option (c), if the Company has not offered reemployment to an eligible employee by the end of 1 year after layoff, any balance then remaining from the Total Maximum Sum for that employee is paid to him provided he was not laid off within 1 year of the time he would have become eligible for early retirement under the Pension Plan.

The number of weeks for which unemployment compensation is payable has varied from time to time. Assuming that period as 26 weeks, and assuming the benefits equal 60% of a week's pay (so as not to call for any draw on the Total Maximum Sum during that time), an eligible employee would need a credit of 15 to 16 week's pay (representing 15 to 16 years' service) in order to have the 60% benefit payments last out the remaining 26 weeks of the year. Of course, if the unemployment compensation benefits do not reach the 60% level, some part of the Total Maximum Sum will be applied to supplemental benefits during those 26 weeks, and something more than 15 to 16 year's service, and corresponding weeks' pay, would be needed to last out the 12 month period.

Reading together the specified terms of the Pension Plan and of the LIB plan, as they must be because they are interlocked, the court considers the position of an employee who is 55 to 59 at layoff to be as follows:

A. If the layoff is expected to last more than 6 months but is not the result of a Location Closedown, he may exercise Option (a), sever his relationship, relinquish recall and service rights, and elect to be paid his Total Maximum Sum as a Lump Sum Payment.

B. Under the same conditions, he may elect not to sever, relinquish or draw down a Lump Sum Payment but instead take Option (b), receiving weekly supplements to unemployment compensation benefits or extensions after they run out, until the Total Maximum Sum is used up, and then Option (c).

C. If the layoff is not expected to last more than 6 months, and is not the result of a Location Closedown, he may not exercise Option (a). He may exercise Option (b) and, if 12 months go by and he has not reached age 60, may draw any balance under Option (c).

D. If the layoff is expected to last more than 6 months, and is the result of a Location Closedown, he will need to decide within 60 days of the layoff whether to exercise Option (a) by severing, relinquishing and being paid the Total Maximum Sum as a Lump Sum Payment, or whether instead to take early retirement under the Pension Plan, also within the same 60 days.

If he files application for early retirement, then, having been eligible he becomes *entitled* to early retirement and by definition cannot be an "eligible employee" under the LIB plan at all.

On the other hand, if he files application for the lump sum payment under Option (a), that fact will disqualify him for early retirement. The options are mutually exclusive.

The point was raised at argument on several occasions, and both EEOC and Westinghouse have agreed that the employee could not receive both the lump sum payment *and* early retirement.

This being so, the court fails to see how there can be any discrimination because of age in violation of ADEA in view of § 623(f). Both the LIB plan and the Pension Plan are "employee benefit plans" as used in that section. The same terms were used in WPPDA, also part of Title 29, in 1958 and the Congress had to be familiar with them when it enacted ADEA in 1967.

In fact, the filed charge that began the inquiry that led to the present suit was filed by the son of an employee over 55, who was receiving early retirement payments, and complained of age discrimination on the ground that he did not receive "severance pay" *as well*. The charge claimed entitlement to *both*, but there is no entitlement to both. Read as the court has read them above, the employee is at best eligible only for one

or the other, but not both. The court considers the choice to be that of the employee, such that by choosing one he cannot have the other. Since the choice is his to make, no ADEA charge can be advanced against the employer.

EEOC argues that the reduced monthly pension on early retirement is a smaller periodic amount than the 60% benefit. That may be, and it would be unusual if it were not because the sum available for retirement payments will need to be paid out over a longer span when early retirement is taken. The actuarial aspects of annuities, combined with the data in standard mortality tables, make this inevitable. The same is true of early retirement at 60 instead of normal retirement at 65, even if no layoff is involved.

The point that EEOC overlooks is that if the employee chooses Option (a), which it calls "severance pay", he can no longer take early retirement. His interest in the plan is vested, of course, under ERISA as well as under the Plan, but he would not be able to draw down retirement payments until age 65. He may not live to 65, and may never draw pension benefits. Some, if not most, may well feel that it is best to take the reduced payments for early retirement and be assured of receiving them for a longer span (whatever that span turns out to be). Mortality tables reflect the experience of very large numbers of lives, and provide no assurance that any individual will in fact live out the experienced span for his age.

Westinghouse concurs in the result, but disagrees with the court's construction of the terms of the LIB plan and the Pension Plan. Its position is that throughout the entire combined history of LIB and the Pension Plan (and both have existed since well before the enactment of ADEA), they have been uniformly construed and applied so that an employee "eligible" for early retirement under the Pension Plan is simply not an "eligible employee" for LIB. Under this construction one eligible for early retirement has no choice in case of layoff. He is put on early retirement, and that fact bars his eligibility for LIB benefits.

If this be the correct construction, it would need to be on the basis of other considerations than the language involved, such

as the context and history of the provisions, the practical construction over the years, the law of the shop, and the like. It may rest in part on the provisions of Option (c) which do not allow payout where layoff occurs within 1 year of when the employee becomes "eligible" for early retirement.

It is not necessary for the court to say that one or another construction is the correct one. The I.U.E., which is the exclusive bargaining agent for the employees it represents is not a party, and besides that a disagreement over construction in this sense is probably a subject for grievance and arbitration, not for judicial determination under the principles of federal labor law.

The fact remains, however, that even if the Westinghouse construction be assumed, there is no ADEA violation under the facts of this case. The reason is that the layoff was the result of closing a plant. That event laid off employees of a wide variety of ages, and with different consequences for employees of the *same age*. The differences in consequences are due not to age but to other factors in the LIB and Pension plans.

An employee aged 56 who was laid off but did not have 10 years service credits was eligible for LIB benefits, including Option (a), but could not have early retirement. Another of the same age with at least 10 years service credit received early retirement under the Westinghouse construction and was therefore not eligible for LIB benefits, the latter being a point on which all parties agree.

A third employee of the same age, with more than 10 years service, would not be eligible for early retirement if he had contractual employment rights at another location or if he was offered employment at another location. In that case, if he were laid off for a period of time he would evidently be eligible for LIB benefits during unemployment under Option (b), and if his layoff was expected to last more than 6 months, could have exercised Option (a) for a lump sum benefit, but, in that event would have severed himself from the company, relinquished his recall and service rights and doubly barred his eligibility for early retirement.

The typical retirement and pension plan inevitably takes account of age. This was one of the points of Justice White's concurring opinion in *United Air Lines*, supra, when he observed that all retirement plans necessarily make distinctions based on age. The desirable goals of actuarial soundness and full funding, to help achieve which ERISA was enacted, cannot be achieved without differences that take account of age. It was in recognition of that basic fact of life and death that § 623 (f)(2) was included in the Act.

As the second analysis based on the Westinghouse construction shows, there are different consequences to employees of the same age, due to conditions in these two inter-related benefit plans that reflect factors other than age.

It also cannot be overlooked that both plans are negotiated plans hammered out at the bargaining table. Under the plan as it stood in 1966, and under the LIB plan of that date, Exh. J-1 and 2, there was no provision for early retirement at age 55.

Normal retirement was at 65, Section 2-A. Early retirement was allowed in two forms, both requiring 10 years' service: (1) an optional retirement at any time after age 60 and before 65; and (2) a mandatory retirement at age 60 for those laid off after age 59 and before age 60, provided he was not returned to regular service before age 60 and provided he had not received a lump sum payment related to length of service solely because he was laid off or separated. Selected retirement, another form of early retirement, was allowed at any time after age 62 and before age 65 for those with at least 30 years service.

These terms were obviously liberalized in 1976 as the result of collective bargaining and as liberalized now provide for early retirement as low as age 58 (instead of 62) for those with 30 years service, and as low as age 55 if laid off by a Location Closedown with at least 10 years of service.

The considerable reliance placed on the collective bargaining process as an important instrument for industrial peace is now firmly embedded in federal labor law as fashioned by the Supreme Court. The liberalization of benefit plans of one kind or another by means of that process is hardly to be disturbed through the judicial process by the strained interpretation of a

statute, like ADEA, which expressly exempts conduct in compliance with bona fide benefit systems of the kind involved here.

5. *The alternate constructions.*

As noted above, the court reads the terms of the LIB plan and the Pension Plan differently than does the employer.

The court's construction sees options in employees who are laid off due to a plant closing (Location Closedown) and who are then at least age 55 and have at least 10 years' credited service, but who do not have contractual employment rights at another location and are not offered employment at another location.

That construction rests on the fact that an otherwise eligible employee for LIB benefits is barred from eligibility if he is "entitled" to early retirement under the Pension Plan. The Pension Plan says that the employee laid off under the above conditions "may apply" for retirement within 60 days of the Location Closedown layoff, *provided* a lump sum payment related to length of service *has not been made* solely because of the Employee being laid off.

Option (a), which is the Lump Sum provision of the LIB plan, also requires exercise within 60 days of a layoff expected to last more than 6 months.

Thus, as the court sees it, an employee under the above conditions could do one of three things (1) he could elect Option (a) under the LIB plan for a lump sum, but in doing so he would sever his relationship and surrender his recall and seniority rights. He would no longer be an employee in active service and, although he might have vested pension rights he could no longer select early retirement; (2) he could elect to take early retirement instead of the lump sum, in which case he would become "entitled" to early retirement and so could not be eligible for LIB benefits; (3) he could exercise Option (b) and draw supplemental unemployment benefits from the LIB plan for up to 12 months, but could not receive any balance under Option (c) because he would have been laid off within 1 year of the date he became "eligible" for early retirement.

Unless reemployed by the company in accordance with his recall rights and seniority, he would not be able to draw early retirement payments because he would no longer be in active service.

The employer's construction is based on the proposition that the conditions for eligibility for LIB benefits should be read as though coverage under the LIB plan were barred if the employee were "eligible" for early retirement under the pension plan rather than "entitled" (as the provision reads).

From the standpoint of the EEOC charge under ADEA, it makes no difference which construction is correct. If the court's construction is correct, there is no ADEA violation because the choice of a lump sum payment under LIB or of early retirement pension payments was a choice of the employee and so cannot be an unlawful act of the employer under 29 USC § 623(a), in and of itself. If the employer's construction is correct, then there is no ADEA violation because the employer's action was based on reasonable factors other than age, 28 USC § 623(f)(1), or was in observance of the terms of a bona fide seniority system and two bona fide employee benefit plans (one welfare and the other pension), none of which can be a subterfuge to evade the purpose of the Act, 29 USC § 623 (f)(2).

In its earlier brief memo ruling, which EEOC asked to have reconsidered, the court suggested that if the company had mistakenly construed the various provisions, the error could be cured by an exchange of benefits with suitable interest adjustments, for those employees not aware that they had a choice, if they had one. This would be a classic instance of mutual mistake.

While the element of mutual mistake is still a potential circumstance, the comments made then as to a method for adjusting benefits were probably not correct. If the court's construction is correct in the sense of supporting the conclusion that no ADEA violation could exist under that assumption, the court now considers it prudent to refrain from any comment on modes for adjusting the assumed error, since it cannot undertake the task on the EEOC complaint and the

outcome may well vary from one to another employee. There are simply too many variables involved to warrant any general formula for adjustment. If called for, they would be in a proceeding other than this one, and may well call for individual analysis.

For instance, in reviewing the tabulated information supplied by the employer to EEOC in response to Interrogatory 2 of the second set of interrogatories, a number of specific variations appear. A few of these are noted.

> . . . one employee aged 56 received LIB benefits of $12.16 and was not put on early retirement. He had been hired 1/11/68 and so was within one year of eligibility for early retirement on 4/1/77, but since he had less than 10 years' credited service, did not have the option for early retirement. He obviously did not choose Option (A) for a lump sum benefit. He applied for employment at the Bloomfield location and was rehired there. [L. Dennis, p. 2, line 7);
>
> . . . an employee aged 54 received neither LIB nor early retirement. He had been hired 2/8/76 and had less than two years' credited service [A. Celico, p.1, line 19];
>
> . . . an employee aged 47, hired 8/7/50, obviously chose Option (A) of the LIB plan and was paid $5,985.20 [M.F. Chuckran, p.1, line 20]; but
>
> . . . another employee aged 46, hired 2/9/51, evidently chose Option (B) of LIB, was paid $332.16 until rehired at Bloomfield where he evidently had contractual employment rights [R.B. Climes, p. 1, l. 21];
>
> . . . An employee aged 58, hired 4/19/71, evidently chose Option (A) of LIB and was paid $1,328. Presumably he could not have taken early retirement as he had less than 10 years credited service [H.H. Piersall, p. 4, line 19];

. . . Another employee, aged 58, hired 8/30/68 and so had less than 10 years' credited service, was paid what seems to be a lump sum of $1,676.24 under LIB [A.Symonies, p. 8, line 5];

. . . An employee age 59, hired 9/26/68 and so had less than 10 years' service, was transferred to the Fairmont Plant and received neither LIB nor early retirement [J. Hanek, p. 8, line 9];

. . . An employee aged 63, hired 2/15/72 (when he was about 58) had less than 10 years' service, could not take early retirement and was paid $1,031.72 of LIB benefits [C. Roche, p. 8, line 12).

From a review of the tabulations in light of the contract provisions for LIB or for pension, coupled with seniority rights which would affect the existence of contractual employment rights at other locations, or with rehirings, it is plain that no ADEA violation could have been involved.

6. *The 1978 Amendment to ADEA.*

In 1978 the Congress amended 29 USC § 623 (f)(2) by adding, at the end, the qualification that:

> "no such seniority system or employment benefit plan shall require or permit the involuntary retirement of any individual specified by [29 USC § 631(a)] because of the age of the individual."

EEOC has argued that this amendment was intended to reflect the original intent of Congress when ADEA was originally enacted in 1967.

The argument is irrelevant or ineffective for several reasons. In the first place, as noted at the start, the complaint nowhere charges a violation of ADEA grounded on involuntary retirement because of age. The undisputed facts are that the employer closed down a plant location, and everyone working there was laid off without regard to age. The tabulation shows employees in their 20's, 30's, 40's, 50's and 60's. The only

claim made was that those who were 55 and over and who receive early retirement did not also received "severance pay", which has turned out to be a misnomer for Option (A) of the LIB plan, and which, had they received it, would have barred early retirement payments.

In the second place, the Supreme Court was aware of the pending amendment when it decided *United Air Lines v McNann*, supra. Justice Marshall in the dissent for himself and Justice Brennan, relies on it in part for his argument. See 434 U.S. at 218, noting that the amendment had passed both Houses before the decision came down, and footnote 11, suggesting that the amendment was intended as a clarification to take effect immediately.

That view, however, was the view of only 2 members of the Supreme Court. The others were aware of the pending change, and reached their decision, binding here, without regard to it.

The events involved in this case took place as far back as January, 1977, some 11 months before the ruling was handed down, and must be controlled by that decision no matter what the prospective effect of the 1978 amendment.

7. *The Statute of Limitations Revisited.*

After full exploration of the ADEA significance of the court's construction versus the employer's construction and the claim of EEOC that the employees for whom it sues were entitled to have *both* Lump Sum LIB payments *and* early retirement payments (a claim it now recognizes to be wholly unsupported by any controlling document) it is plain that there has been no violation of ADEA.

This being so, there cannot have been any "willful" violation, and so the applicable statute of limitations is the two year statute rather than the three year statute, under the Portal-to-Portal Act.

Such few reported cases as there are on the difference between a "violation" of ADEA and a "willful violation" are of negligible aid to the trial courts. In this case, it happens that the filing of suit is too late under the three year statute, and

that after inspecting all the alternative theories it is obvious that there was no violation at all, much less a "willful" one, but only a misguided claim for double-dipping benefits which all the documents indicate are to be barred.

The details of seniority systems, welfare benefit plans, pension benefit plans, and the like, are highly complex. More often than not their terms are the result of hard collective bargaining. It is not unusual to find seeming contradictions in documents which are the encrustation of various changes negotiated over the years, usually not deleting old provisions lest someone lose an existing benefit, but rather adding new ones.

In enacting ADEA the Congress recognized that many arrangements of this kind have been long and well established, that the factor of age is inevitably involved in working out the economic aspects of such arrangements, and that this fact was not to be regarded as any kind of indication of an ADEA violation so long as the seniority system or benefit plan was bona fide, and not a subterfuge to evade the purposes of the Act.

Given this context it is difficult to see how the application of a system or plan of this kind can come within the scope of what the Act prohibits when all the evidence shows that the specific terms and conditions were negotiated at the collective bargaining table, and yet call a "technical" violation a "willful" one merely because the act was done. Whatever the word "willful" may mean in other contexts, its use in ADEA reflects some state of mind outside the scope of subject matter in which age is a reasonable and relevant factor.

The amount of pension benefits, or of LIB benefits, in this case for example, are tied primarily to the level of earnings and the years of service with the employer. Age is inevitably involved and cannot be excluded as a factor in making the arrangements. An employee with one year's service must be one year older than when first hired. The actuarial sum needed to pay some particular periodic amount will depend on how much was paid in over how many years, and when payments begin for a span to run for the rest of the employee's life, and

for a surviving spouse or other successor beneficiary, age must enter into the equation because life ends in death and the statistical base is very large and very reliable. It must be taken into account.

To some extent, the impression here is that EEOC misconceived the foundation for the claim asserted, and when the error was discovered failed to understand that the error was fatal to the ADEA claim.

In any event, in circumstances where the time devoted to a careful study of the documentation and the history is as thorough as it had been in this case, the court sees no rational basis for claiming a "willful" violation if there were any violation at all, which the court is thoroughly satisifed there was not.

Submit order simply reciting that for the reasons here given, the EEOC motion for partial summary judgment is denied, and that the Westinghouse cross-motion for summary judgment is granted.

July 29, 1982

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: All counsel

APPENDIX D

Supplemental Memorandum Opinion of the United States District Court, dated November 1,1982

UNITED STATES DISTRICT COURT
ROOM 411, U.S. POST OFFICE BUILDING
NEWARK, NEW JERSEY 07102
FTS (8) 341-2517

VINCENT P. BIUNNO
Judge

(201) 645-2517
(201) 642-2451

MEMORANDUM

Re: EEOC v. Westinghouse,
Civ. 80-853

After the court's opinion was filed on July 29, 1982, and the order based on it was filed August 5, 1982, EEOC filed on August 9, 1982 a motion under F.R.Civ.P.59(e) to alter or amend the opinion of July 29, 1982. It was heard and considered as a motion to alter or amend the judgment filed August 5, 1982.

While the points raised by EEOC do require some elaboration and more detailed treatment of a number of aspects, they do not affect the outcome or the judgment, which will remain unaltered.

1. *The tolling provision of* 29 USC § 626 (e)(2)

This question involves four named plaintiffs: L. Cook, M. Leeming, J. Yurkovich and G. Koski, who were counselled, and told they would be put on early retirement without LIB, on March 16, 1977.

As observed in the main opinion, that date is more than 3 years before the filing date of the complaint on March 28, 1980 and so those claims are barred by the longer 3-year statute of limitations, not to mention the usual 2-year statute.

The motion points out that a tolling provision set out in 29 USC § 626 (e)(2) calls for suspension of the running of the

Statute of Limitations "for the period during which the Secretary [of Labor] is attempting to effect voluntary compliance with the requirements of this Chapter through informal methods of conciliation, conference and persuasion." This provision was added by Pub. L. 95-256, and after it was on the books, there was a period of conciliation, conference and persuasion from May 5, 1979 to May 30, 1979, a period of 25 days. This appears as Proposed Finding of Fact No. 181 as submitted by EEOC. At the hearing of September 13, 1982, both sides agreed that this was the time period involved.

Application of the tolling provision and of the 25 day period means that the complaint is to be regarded as having been filed March 3, 1980, instead of March 28, 1980. Since this is less than 3 years after the counselling on March 16, 1977 of the four individuals mentioned, EEOC argues that the three year statute had not run out as to them, even though the two year statute had.

Westinghouse points to a number of difficulties with EEOC's argument. One is that the four individuals mentioned were not named in the original complaint. Only Mr. Meola was named. Others were referred to as "John Does" similarly situated. Because the Congress has enacted a specific rule to control the date when an action is commenced for the purpose of the statute of limitations here, the position is that it was not until February 28, 1981 (or February 3, 1981 if 25 days are subtracted for conciliation) that the action was commenced for these four individuals, and these dates are nearly four years after the event.

The provision relied on is the last sentence of 29 USC § 216(c), which was added by the Act of October 26, 1949, and was continued unaltered by the amendment of November 1, 1977, Pub. L. 95-151, sec. 10. That sentence is explicit in providing that in determining when an action is commenced for the purposes of the statutes of limitation in the Portal-to-Portal Act of 1947, 29 USC § 255(a),

> "it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is

> filed *if he is specifically named* as a party plaintiff in the complaint, or if his name did not so appear, *on the subsequent date on which his name is added* as a party plaintiff in such action." (Emphasis added)

This provison in § 216(c) applies to actions brought by the Secretary under that subsection, a step which terminates the right of individual employees to bring private actions under § 216(b). It is of some significance that while § 216(b) authorizes private suit to be brought by any one or more employees "for and on behalf of himself or themselves and other employees similarly situated", no employee may be a party plaintiff in such a suit unless he gives his consent in writing, and the consent is filed in the court.

Thus, this is one of those cases in which the Congress has dealt with the question by the explicit language of the statute, the plain meaning of which leaves nothing to construe. The Congress borrowed the statutes of limitation from the Portal-to-Portal Act for both the Fair Labor Standards Act and for ADEA. It built ADEA on the structure of the Fair Labor Standards Act, not on Title VII of the Civil Rights Act. It created the right of action, specified who could bring suit and within what time limit, and also spelled out how it was to be determined that an action had been commenced by or for a particular claimant. Under these conditions, general rules of practice that might otherwise be looked to have no force in the face of the explicit directions.

The second difficulty is that the only charge in existence at the time of the conciliation period in May, 1979 was Mr. Meola's charge. Suit on that charge was filed March 28, 1980 and is backdated to March 3, 1980 to allow for the conciliation period on his claim. But despite the use of the usual "John Doe" device, the last sentence of § 216 (c) prevents it from having any effect as to any plaintiff other than Meola all of whom were named for the first time in the amended complaint filed February 28, 1981.

For the foregoing reasons, while the counselling date for four plaintiffs was March 16, 1977, and while a complaint

specifically naming them would have been within the 3-year statute if filed on or before March 16, 1980 (or so treated) the failure to specifically name them precludes that result. In the language selected by Congress the action was commenced, as to each plaintiff other than Meola, "on the subsequent date on which his name" was added by the amended complaint, i.e., on February 28, 1981.

The analysis shows that no different result is called for on this account, and the judgment will stand unchanged.

2. The Effect of *Delaware State College v. Ricks.*

This decision, 449 U.S. 250 (1980) is claimed to be inapplicable to Cook, Leeming, Yurkovitch and Koski. By this claim the court understands it to be argued, not that *Delaware College* does not apply, but that its application to those four does not bar their claims.

This aspect has no force because of the explicit language used by the Congress in § 626 (c), discussed above, since none of the four was specifically named in the original complaint, and none had his name added until February 28, 1981.

It is also argued that *Delaware College* did not overrule *Bonham v. Dressler Industries*, 569 F.2d 187 (CA 3, 1977) cert. den. 439 U.S. 892 (1978). The decision in *Fernandez v. Chardon*, 648 F.2d 765 (CA 1,1981) is referred to for a discussion of the differences between *Delaware College* and *Bonham.*

There are a number of difficulties with this argument, not the least of which is that the decision relied on was reversed in *Chardon v. Fernandez*, ____ U.S. ____, 70 L Ed 2d 6 (1981) on the basis of *Delaware College.*

The second difficulty is that it is neither necessary nor the practice of the Supreme Court to "overrule" decisions of lower courts. It will affirm, reverse, modify or vacate judgments of lower courts that are before it for review, and in the process it may "overrule" one or another of its *own* earlier decisions, but even when it undertakes review to resolve a conflict between the circuits, the Supreme Court does not formally and explicitly note the lower court decisions adversely affected as precedent.

The third difficulty is that in *Delaware College* itself, the Supreme Court rejected the reasoning of the Court of Appeals which had rested on and quoted from *Bonhaim*, see 66 L Ed 2d at 438.

Accordingly, there is no reasons to alter the judgment on this account.

3. *A plant closedown is not necessarily conclusive.*

This point was advanced because the court's opinion had observed that individuals of all ages were laid off as the result of the plant closedown, so that the lay off, in and of itself, did not evidence age discrimination.

The argument is that there can be age discrimination even though there be a plant closedown. In principle, that is no doubt so, but in such cases the fact remains that the closedown or layoff, in and of itself, would not evidence age discrimination or any other kind of job discrimination, even though some other kind of evidence might.

The point, as well as the remaining ones raised, is no more than an attempt to argue what might be a breach of contract claim as though it were an ADEA claim, which it is not.

The collectively bargained terms either make early retirement mandatory under the facts of this case, or else they provide the employee with an option to take one or the other of lump sum LIB or early retirement, but not both.

Whichever of these two readings is correct, both are exactly the same to the extent that the employee has no right to both lump sum LIB and early retirement.

The claim filed for Mr. Meola asserted a right to *both*. The original complaint and the amended complaint seek *both*. At every hearing in this case counsel have agreed that under no condition is any employee entitled to both. This was mentioned again at the last hearing, Tr. 9/13/82, p. 10, lines 7 to 17.

Reliance is also placed on *Sikora v. American Can Co.*, 622 F.2d 1116 (CA 3, 1980) as to alteration of the plan in 1976, ignoring the fact, reviewed in detail in the opinion filed July 29, 1982, that the alteration was not unilateral but a bilateral

change made as the consequence of collective bargaining. Not only that, but the mutually exclusive nature of lump sum LIB and early retirement goes back to 1960, not 1976.

This argument is no more than an attempt to persuade this court to follow the minority view expressed in dissent in *United Airlines v. McMann*, 434 U.S. 192 (1977) and to give retroactive effect to the 1978 amendment to 29 USC § 623 (f)(2). The modification of terms in this case occurred in 1976, and the plant closedown in early 1977. The refusal of the Supreme Court to adopt the views of the dissent later that year cannot be ignored, overlooked or otherwise disregarded.

November 1, 1982

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: John J. Lokos, Esq.
Thomas L. Morrissey, Esq.

APPENDIX E

Order of the United States District Court, dated August 5, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Honorable Vincent P. Biunno)

Civil Action No. 80-853

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—vs.—

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

This matter having come before the Court on the motion of plaintiff, Equal Employment Opportunity Commission, for partial summary judgment, and the cross-motion of defendant, Westinghouse Electric Corporation, for summary judgment; briefs having been submitted on behalf of both parties; and argument having been heard; it is

ORDERED, on this 5th day of August, 1982, for the reasons set forth in the Court's Opinion dated July 29, 1982, that the Equal Employment Opportunity Commission's motion for partial summary judgment is denied, and Westinghouse Elec-

tric Corporation's cross-motion for summary judgment, dismissing the Amended Complaint in its entirety, is hereby granted.

no costs

VINCENT P. BIUNNO

Vincent P. Biunno, U.S.D.J.

ORIGINAL FILED
Aug 5 1982
Allyn Z. Lite, Clerk

APPENDIX F

Order of the United States District Court, dated November 1, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civ 80-853

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

—vs.—

WESTINGHOUSE ELECTRIC CORPORATION

Defendant.

ORDER

For the reasons set out in the Memorandum of even date, the plaintiff's motion to alter or amend the opinion of July 29, 1982, treated as one to alter or amend the judgment dated and filed August 5, 1982 be and the same hereby is ordered denied.

November 1, 1982

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: All counsel

ORIGINAL FILED
Nov 3 1982
Allyn Z. Lite, Clerk

APPENDIX G

Judgment of the United States Court of Appeals, dated December 29, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5008

(D.C. Civ. No. 80-00853)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Appellant

—VS.—

WESTINGHOUSE ELECTRIC CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY—Newark

Present:

WEIS, HIGGINBOTHAM, and SLOVITER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey—Newark and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 6, 1982, as made final by its order entered November 4, 1982, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:
/s/ Sally Mrvos
Clerk

December 29, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 8, 1984.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States
Court of Appeals for the Third Circuit.

APPENDIX H

Order of the United States Court of Appeals Denying Petition for Rehearing, dated January 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5008

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant-Appellee

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
SLOVITER, HIGGINBOTHAM and BECKER,
Circuit Judges.

The petition for rehearing filed by Westinghouse Electric Corporation, defendant-appellee in the above-entitled case

having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ A. Leon Higginbotham
Circuit Judge

Dated: Jan 31 1984